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No. 08-699

IN THE

# Supreme Court of the United States

E.I. DUPONT DE NEMOURS & COMPANY,
*Petitioner*,

v.

AMPTHILL RAYON WORKERS, INCORPORATED,
*Respondent*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the parties' agreement to provide benefits to employees covered by a collective bargaining agreement "subject to" the terms of separate ERISA benefit plans that contain dispute resolution procedures for benefit eligibility constitutes forceful evidence that the parties intended to exclude from labor arbitration disputes involving eligibility for plan benefits?

## PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that the parties to this proceeding in the United States Court of Appeals for the Fourth Circuit are the same as the parties to this proceeding: Petitioner E.I. DuPont de Nemours Company and Respondent Ampthill Rayon Workers, Incorporated.

## RULE 29.6 STATEMENT

Petitioner is a publicly-traded corporation. It has no parent corporation and no other publicly-traded entity owns ten percent or more of its stock.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

E.I. DuPont de Nemours & Company ("DuPont" or "petitioner") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *E.I. DuPont de Nemours & Company v. Ampthill Rayon Workers, Incorporated*, 2008 WL 3980869, No. 07-2075 (4th Cir. Aug. 25, 2008).

## OPINIONS BELOW

The decision of the court of appeals is unpublished and available at *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, No. 07-2075 2008 WL 3980869, (4th Cir. Aug. 25, 2008). It is reprinted at App. 1a-9a. No request for rehearing or rehearing en banc was filed in this matter.

The court of appeals affirmed the decision of the United States District Court for the Eastern District of Virginia, which is available at *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d. 588 (E.D. Va. 2007), and reprinted at App. 10a-26a.

## JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment and opinion on August 25, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 are reproduced at App. 58a-59a: 29 U.S.C. §§ 1002(21)(A); 1104(a)(1)(D); 1132(a)(1)(B); and 1133. The following regulation is reproduced at App. 59a-61a: 29 C.F.R. § 2560.503-1(b)(6).

## INTRODUCTION

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA") gives employee benefit plan sponsors wide discretion in the design and administration of their plans. *Lockheed v. Spink,* 517 U.S. 882, 887 (1996); *Black & Decker Disability Plan v. Nord,* 538 U.S. 832, 833 (2003). Employers and other ERISA plan sponsors have the right to include language in a plan giving the plan administrator discretion to interpret the plan's eligibility provisions. Such language entitles the plan sponsor to have decisions as to both benefit eligibility and claims for benefits reviewed by a court only for abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Last term, in *Met-*

*ropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), this Court reaffirmed *Firestone* and concluded that ERISA plan sponsors can adopt a plan design by which benefit eligibility disputes will be decided by a court under the abuse of discretion standard even in circumstances where the plan sponsor may have a conflict of interest. *Id.* at 2350-51.

The decision below forces DuPont to sacrifice this right. The lower court's decision requires DuPont to arbitrate a dispute involving an alleged violation of one of its several collective bargaining agreements, which would effectively permit a labor arbitrator to decide whether some of DuPont's unionized employees are eligible for benefits under the amended terms of certain employee benefit plans. Labor arbitrators do not utilize an abuse of discretion standard in evaluating claims that an employer breached a collective bargaining agreement. And because courts review labor arbitration awards under an extremely deferential standard of review, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598-99 (1960), DuPont would have an unduly burdensome time trying to vacate an adverse decision by an arbitrator. Having this dispute decided by a labor arbitrator fundamentally changes the way in which the benefits eligibility issues underlying this dispute would be resolved, at the inevitable expense of DuPont's rights as an ERISA plan sponsor. The decision below also threatens to deny plan participants and beneficiaries their right to a "full and fair" review of a benefits eligibility decision, contrary to the command of Section 503 of ERISA, 29 U.S.C. § 1133.

This is a recurring issue of importance to employers, labor unions and benefit plan participants. Employers across the country are constrained to modify

benefit plans in an effort to reduce costs and remain (or become) competitive in these difficult economic times. The lower court's decision permits labor unions to bypass the well-established rules for resolving benefit eligibility disputes mandated by Section 503 of ERISA, 29 U.S.C. § 1133. By characterizing such disputes as contract violations, unions can seek to have such disputes resolved by a potentially sympathetic arbitrator applying different legal standards. By permitting this sort of forum shopping, the lower court's decision threatens unionized employers with the risk of increased litigation and inconsistent outcomes not contemplated by ERISA.

The resulting uncertainty concerning benefit eligibility works to the detriment of participants and beneficiaries. For participants and beneficiaries, the decision below creates an intolerable conflict between the judicial standard of review of labor arbitration decisions and the principles reaffirmed by this Court in *Metropolitan Life v. Glenn*.

The lower court's decision unwisely extends the labor law presumption of arbitrability to benefit eligibility disputes under ERISA plans that Congress intended to be resolved exclusively under ERISA. Review of the decision below is needed to resolve the question, not yet decided by the Court, of how to harmonize the labor law presumption of arbitrability with ERISA's civil enforcement scheme. Similar issues about the proper role of labor arbitration in cases involving statutory rights are presented in *14 Penn Plaza v. Pyett*, No. 07-581, *cert. granted*, 128 S. Ct. 1223 (U.S. Feb. 19, 2008).

## STATEMENT OF THE CASE

DuPont is the plan sponsor and plan administrator of several employee benefit plans covering more than 100,000 current and former DuPont employees and beneficiaries across the United States. DuPont's plans include both retirement plans and welfare plans as defined in ERISA. App. 11a. The plans, which have been in existence for decades, provide benefits to union and non-union participants alike and were not created through collective bargaining. App. 12a. In August 2006, DuPont announced amendments to several of these plans. In December of that year, DuPont adopted amendments to the plans, which made prospective changes affecting the eligibility of participants for certain plan benefits.

Respondent Ampthill Rayon Workers, Incorporated (the "Union") filed a grievance under the terms of its collective bargaining agreement ("CBA") with DuPont. The grievance alleged that the changes made by DuPont violated the CBA. App. 28a-30a. DuPont denied the grievance and refused to arbitrate it as presented. App. 31a-33a. DuPont advised the Union that the grievance implicated benefit eligibility issues to be resolved exclusively under the plans' dispute resolution procedures and/or ERISA's civil enforcement procedures. DuPont invited the affected employees to follow those procedures. App. 32a.

DuPont subsequently initiated a lawsuit in the Eastern District of Virginia, seeking a declaration that disputes over Union members' eligibility for benefits under the plans must be resolved through the dispute resolution mechanisms set forth in the plan documents or in a civil action brought under Section 502 of ERISA, 29 U.S.C. § 1132. The complaint also sought a declaration, under Section 301 of

the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"), that DuPont's decision to amend the plans did not violate the CBA. The Union filed a counterclaim alleging a violation of the CBA and seeking an order compelling arbitration of the grievance. The district court had jurisdiction over this matter pursuant to 28 U.S.C. § 2201 as an action for declaratory judgment and 28 U.S.C. § 1331 because it involved questions of federal law arising under ERISA.

The parties agreed to submit the case for decision on cross-motions for summary judgment. DuPont argued that the dispute was not subject to arbitration because the parties had agreed in the CBA that Union members' participation in DuPont's benefit plans was "subject to" the terms of the plan documents, which included the dispute resolution procedures set forth in the plans pursuant to Section 503 of ERISA, 29 U.S.C. § 1133. DuPont further argued that nothing in the plans' language evinces an intent by the parties to provide a labor arbitrator with the authority to supplant the plan administrators' authority with respect to decisions regarding benefit eligibility. DuPont also argued that the CBA authorized DuPont to amend the benefit plans at issue and that this issue could and should be decided by a court, rather than by a labor arbitrator, consistent with the legal principles applied in cases arising under Section 301, 29 U.S.C. § 185. On September 24, 2007, the district court (Hudson, J.) ordered the parties to arbitrate the Union's grievance with respect to four of the benefit plans at issue. App. 26a-27a.

DuPont appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit. DuPont argued before the Fourth Circuit that

the disputed aspects of the grievance were not subject to arbitration because the language of the CBA effectively excluded disputes regarding benefit eligibility from arbitration. DuPont also argued that allowing arbitration of benefit eligibility disputes irreconcilably conflicted with DuPont's rights and obligations as an ERISA plan sponsor and fiduciary.

The Fourth Circuit affirmed the district court, holding that the CBA's arbitration provision required arbitration of the Union's grievance. App. 9a. The court concluded that arbitration was compelled in light of the presumption of arbitrability articulated in the "*Steelworkers Trilogy*." *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Like the district court, the Fourth Circuit did not purport to analyze the language in the CBA that demonstrates the parties' agreement to have benefit eligibility disputes resolved exclusively under the dispute resolution procedures of the plans, consistent with Section 503 of ERISA, 29 U.S.C. § 1133. With respect to DuPont's argument that the submission of the grievance to arbitration is inconsistent with its rights and obligations under ERISA, the Fourth Circuit stated only that "[S]ending this grievance to an arbitrator is hardly inconsistent with ERISA (despite DuPont's claims to the contrary), and quite frankly is the only option that conforms to the mandates of the Supreme Court." App. 9a.

## REASONS FOR GRANTING THE PETITION

### I. THE RULING BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISION IN AT&T TECHNOLOGIES AND THE DECISIONS OF OTHER CIRCUIT COURTS.

Arbitration is a matter of contract, and a party cannot be compelled to arbitrate a dispute that it has not agreed to arbitrate. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). A dispute over substantive arbitrability is a question for judicial determination. *Id.* at 649. In *AT&T Technologies,* this Court confirmed the rule, first articulated in *Warrior & Gulf,* that arbitration is not appropriate if a matter is expressly excluded from arbitration or if there is "forceful evidence" that the parties intended to exclude a dispute from arbitration. *Id.* at 650.

The decision below misapplied the "forceful evidence" rule in a way that cannot be reconciled with either this Court's ruling in *AT&T Technologies* or the rulings of the Fifth, Sixth and Seventh Circuits. Although the Fourth Circuit correctly concluded that the conduct challenged in the Union's grievance "affect[s] employee's eligibility to receive benefits under the plans," the court inexplicably failed to address the dispositive language in Article VII of the CBA that demonstrates the parties' intent to exclude from arbitration matters bearing upon eligibility for benefits under the plans at issue. Article VII of the CBA expressly states that Union members may receive benefits under the Plans, but only "subject to" the terms of those plans, including the dispute resolution procedures set forth in each of the plans. App. 35a. Each of the plans at issue, in turn, expressly states

that the administrators of the plans retain sole responsibility for interpreting the terms of the plans and for making benefit eligibility determinations under the plans. App. 45a. Each plan also contains a stand-alone dispute resolution procedure, promulgated pursuant to Section 503 of ERISA.[1] After exhaustion of that procedure, a plan participant or beneficiary is permitted to challenge the plan's decision under Section 502 of ERISA, 29 U.S.C. § 1132.

The Fifth, Sixth and Seventh Circuits have each recognized that a benefit plan referenced in a collective bargaining agreement, like the plans at issue here, "which expressly provides that the decisions of the Plan Administrator will be final and binding on all interested parties, expresses an intention to exclude from arbitration all benefit disputes which are within the Administrator's authority." *United Steelworkers v. Commonwealth Aluminum Corp.*, 162 F.3d 447, 451 (6th Cir. 1998).

The Fifth Circuit assessed the overlap of benefit plan dispute resolution procedures and labor arbitration in *Local 4-449, Oil, Chem. & Atomic Workers v. Amoco Chem. Corp.*, 589 F.2d 162 (5th Cir. 1979). There, the parties' collective bargaining agreement provided that employees would receive sickness and disability benefits in accordance with the sickness and disability benefits plan in effect at the time. The benefit plan reserved to the company's board of directors the right to interpret, apply, amend or revoke the plan, and contained an internal dispute resolu-

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[1] There is no suggestion in this case that the dispute resolution procedures in the plans do not comply with the substantive and procedural requirements of Section 503 of ERISA, 29 U.S.C. § 1133, or that they do not provide an opportunity for a "full and fair" review of the plan administrator's decision.

tion procedure providing that decisions of the board in all matters concerning administration of the plan would be final.

The plaintiff union in *Amoco* sued to compel arbitration of grievances contesting the denial of sick pay benefits, arguing that the matter was arbitrable because the collective bargaining agreement contained a broad arbitration clause and no express language excluded the subject matter from arbitration. The Fifth Circuit affirmed the district court's refusal to compel arbitration, notwithstanding the broad arbitration clause, stating:

> It is apparent from the face of the Agreement and Plan that problems concerning sickness and disability benefits were intended to be allocated to the Board for final determination. This process, which is expressly constructed by the Agreement and the Plan, sufficiently excludes arbitration for grievances concerning sickness and disability benefits.

*Id.* at 164. The court further explained that the language making the Board's decision final in these matters "obviously excludes arbitration for grievances concerning such subject matter." *Id.*

The Sixth and Seventh Circuits applied the same logic in *Commonwealth Aluminum Corp.*, 162 F.3d at 452, *Printing Specialties & Paper Prods. Union, Local 680, GCIU v. Nabisco Brands, Inc.*, 833 F.2d 102 (7th Cir. 1987), and *Int'l Ass'n of Machinists & Aerospace Workers Dist. 10 v. Waukesha Engine Div.*, 17 F.3d 196 (7th Cir. 1994). In *Commonwealth Aluminum*, the Sixth Circuit rejected a union's motion to compel arbitration of a grievance that involved matters of benefit eligibility under the terms of an ERISA bene-

fit plan, despite the union's argument that the dispute involved a violation of a collective bargaining agreement. 162 F.3d at 452. In reaching this conclusion, the Sixth Circuit stated:

> We find that the incorporation of the claims review procedure, which expressly provides that decisions of the Plan Administrator will be final and binding on all interested parties, expresses an intention to exclude from arbitration all matters within the Administrator's authority.

*Id.* at 451.

The Seventh Circuit followed the same approach in *Nabisco* and *Waukesha*, finding that "the fact that the Plan expressly provides for an alternative review procedure indicates that the parties did not intend to arbitrate disputes" covered by that alternative procedure. *Waukesha*, 17 F.3d at 198. The Seventh Circuit denied arbitration despite the fact that the unions in both cases, characterized the disputes as involving violations of the parties' collective bargaining agreement. *Id.*[2] *See also Nabisco*, 833 F.2d at 105 (rejecting arbitration because grievance presented a "claim for benefits which [was] arguably

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[2] Other courts have similarly held that disputes subject to exclusive dispute resolution procedures found in ERISA benefit plans are not arbitrable, even though the disputes may also be characterized as violations of a collective bargaining agreement. *See United Steelworkers, Local 323 v. Dixie Consumer Prods.*, 533 F. Supp. 2d 735 (W.D. Mich. 2008); *PDG Chem. Inc. v. Oil, Chem. & Atomic Workers Int'l Union*, 164 F. Supp. 2d 856 (E.D. Tex. 2001). In all of these cases, the courts determined that the disputes at issue were not arbitrable despite claims by the unions that the disputes could be characterized in a grievance asserting a violation of their collective bargaining agreements.

provided for in the terms of the pension plan, not the collective bargaining agreement").

The Fourth Circuit's decision below misapplied the "forceful evidence" rule in two fundamental respects. *First,* as explained above the court failed to consider the substantive provisions of the parties' CBA. The Fourth Circuit panel stopped its analysis after reaching its conclusion as to the scope of the arbitration clause in the parties' CBA. App. 8a-9a That approach simply cannot be reconciled with this Court's decision in *AT&T Technologies.* Nothing in the Court's discussion about the presumption of arbitrability suggests it is appropriate for a court to ignore the substantive provisions in the parties' collective bargaining agreement in deciding whether the "forceful evidence" standard has been satisfied, and for good reason. Parties to a collective bargaining agreement routinely agree to various ways of resolving particular types of disputes other than through traditional grievance arbitration. Such agreements may be found in provisions of a collective bargaining agreement other than the arbitration clause, or even in separate instruments.[3] A court obviously cannot

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[3] Evidence found beyond the four corners of a collective bargaining agreement may demonstrate the parties' intention to exclude certain matters from arbitration. *See, e.g. United Steelworkers v. Cooper Tire & Rubber Co.*, 474 F.3d 271, 279 (6th Cir. 2007) (reviewing substantive terms of collective bargaining agreement and "side letter" to determine arbitrability); *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005) (same); *Cornell Univ. v. UAW Local 2300*, 942 F.2d 138, 140 (2d Cir. 1991) (same). These decisions are consistent with the settled rule that parties to a collective bargaining agreement may agree to have certain disputes decided under an alternative dispute resolution procedure set forth in a separate agreement. *See, e.g., KenAmerican Resources, Inc. v. UMWA*, 99 F.3d 1161 (D.C. Cir. 1996) (memorandum of understanding established a

discharge its obligation to determine whether the parties agreed to arbitrate a particular dispute by refusing to examine the pertinent contract provisions, in violation of basic contract law principles. The Fourth Circuit fundamentally misread *AT&T Technologies* by concluding it could not review the substantive contract law provisions at issue here out of a concern that it not decide the merits of the grievance. *See Litton Fin. Printing Div., v. NLRB*, 501 U.S. 190, 209 (1991) (courts "must determine whether parties agreed to arbitrate" and "cannot avoid that duty because it requires [courts] to interpret a provision of a collective bargaining agreement"); *Crown Cork & Seal Co. v. Int'l Assoc. of Machinists & Aerospace Workers*, 501 F.3d 912, 917 (8th Cir. 2008).[4]

*Second*, the Fourth Circuit failed to consider the impact of regulations issued by the United States Department of Labor ("DOL"). Section 503 of ERISA requires all benefit plans to establish procedures for resolving disputes over plan interpretation, including determinations of eligibility and claims for benefits. 29 U.S.C. § 1133. The DOL has issued specific regulations that establish a mechanism by which parties

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separate dispute resolution procedure for disputes over preferential hiring rights)

[4] The decision below likewise cannot be reconciled with the logic and results of the decisions of the Fifth, Sixth and Seventh Circuits discussed above. Those courts correctly found "forceful evidence" of an intention to have benefits eligibility disputes resolved under the dispute resolution provisions of the plans rather than through grievance arbitration under the CBA in the combination of substantive provisions of the parties' collective bargaining agreements and the dispute resolution provisions of the ERISA plans. *See Amoco*, 589 F.2d at 162, *Commonwealth Aluminum*, 162 F.3d at 447; *Waukesha*, 17 F.3d at 196; *Nabisco*, 833 F.3d at 105.

to plans maintained pursuant to a collective bargaining agreement can provide for an arbitration procedure to resolve the types of plan eligibility disputes presented in this case. *See* 29 C.F.R. § 2560.503-1(b)(6). The regulations provide that grievance and arbitration procedures in the parties' collective bargaining agreement pursuant to which a benefit plan is maintained may be used in two circumstances: (1) where the benefit plan specifically incorporates the arbitration provision set forth in the parties' collective bargaining agreement; or (2) where the collective bargaining agreement specifically incorporates the plan by reference, thereby subjecting the plan to the collective bargaining agreement's general grievance and arbitration procedures. *Id.*

In this case, the parties' CBA satisfies neither of these conditions. The parties' decision to forego this procedural option is additional "forceful evidence" that the parties did not intend to have disputes arising under the terms of an ERISA benefit plan resolved through labor arbitration. *See United Steelworkers v. Rohm & Haas, Co.*, 522 F.3d 324, 335 (3d Cir. 2008) (evidence that neither benefit plan nor collective bargaining agreement satisfied the criteria for arbitration under ERISA regulations showed parties' intent to submit dispute to plan's procedure, not labor arbitration).

In short, the decision below failed to follow this Court's admonition in *AT&T Technologies* to examine the "forceful evidence" of the parties' agreement to exclude from arbitration disputes over benefits eligibility matters. It is too easy for a union to invoke the presumption of arbitrability to mischaracterize what is really a dispute over benefit plan eligibility as a violation of the parties' collective bargaining agree-

ment. As this case demonstrates, such mischaracterizations put the presumption of arbitrability on an unacceptable collision course with an employer's well-settled rights and obligations under ERISA. It also causes undesirable and unnecessary confusion with respect to the rights of participants and beneficiaries under Section 503 of ERISA, 29 U.S.C. § 1333.

## II. THE RULING BELOW IMPROPERLY EXTENDS THE PRESUMPTION OF ARBITRABILITY TO DISPUTES CONGRESS INTENDED TO BE RESOLVED UNDER ERISA.

### A. The Lower Court's Ruling Disrupts ERISA's Carefully Crafted Framework for the Resolution of Benefit Plan Eligibility Disputes

This Court's decision last term in *Metropolitan Life v. Glenn* reaffirmed the principles announced in *Firestone v. Bruch*, 128 S. Ct. at 2350-51. It is now clear that ERISA plan sponsors can design and administer benefit plans in such a way as to have benefit eligibility disputes reviewed under the deferential abuse of discretion standard articulated in *Firestone v. Bruch*. *Id.*

*Metropolitan Life v. Glenn* is consistent with this Court's prior decisions on critical issues involving the administration of ERISA plans. The Court, for example, has consistently held that the civil enforcement provisions of ERISA, including Section 502(a)(1)(B), "set forth a comprehensive civil enforcement scheme" that was "intended to be exclusive." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). *See also Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004). The Court has recognized that the congressional pur-

pose of "nationally uniform plan administration" is thwarted by the imposition of substantial burdens on plan administrators. *Egelhoff v. Egelhoff,* 532 U.S. 141, 148 (2001). The Court has similarly understood "the congressional goal of 'minimiz[ing] the administrative burden[s]' on plan administrators." *Id.* at 149-50 (citation omitted).

This Court's decisions reflect the reality that employee benefit plans are offered at the discretion of an employer. *See Beck v. Pace Int'l Union,* 127 S. Ct. 2310, 2314 (2007); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 376 (2002) (there is a "public interest in encouraging the formation of employee benefit plans") (citation omitted) (Roberts, C.J., concurring). *See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S. Ct. 1020, 1027 (2008). ERISA's legislative history reflects the Congressional policy that, because the costs of administering employee benefit plans could deter employers from establishing and maintaining them, Congress sought to "strike a balance between providing meaningful reform and keeping costs within reasonable limits." H.R. Rep. No. 93-805, at 15 (1974). ERISA is designed to strike this balance while achieving its central objective of protecting the interests of participants and beneficiaries. Among other things, the so-called "plan documents" rule codified in Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D), is intended to ensure that a plan participant can "determine exactly what his rights and obligations are under the terms of the plan." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 83 (1995), quoting H.R. Rep. No. 93-1280 at 297 (1974). And Section 503 of ERISA makes plan participants entitled to a "full and fair review" by the plan fiduciary of any decision denying any claim for benefits. 29 U.S.C. § 1133(2). ERISA is a "complex

and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt*, 508 U.S. 248, 262 (1993). The Court has recognized that the costs of delay and uncertainty associated with benefit plan administration are "ultimately borne by the beneficiaries" of the plan. *Egelhoff*, 532 U.S. at 150.

The decision below undermines this carefully balanced scheme. In the absence of an agreement reflecting the parties' compliance with the DOL regulations implementing Section 503 of ERISA, permitting an outcome by which labor arbitrators effectively decide benefits eligibility disputes is irreconcilable with ERISA's civil enforcement scheme, which Congress "intended to be exclusive." *Pilot Life Ins. Co.*, 481 U.S. at 54. Petitioner's statutory right to have eligibility disputes decided by a court pursuant to Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), under the standards articulated in *Firestone v. Bruch* and *Metropolitan Life v. Glenn* would evaporate if the dispute in this case were decided by a labor arbitrator. Labor arbitrators do not employ a deferential standard of review in deciding whether an employer has breached a collective bargaining agreement.[5] And an employer

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[5] Arbitrators are merely required to construe the terms of collective bargaining agreements, without resort to any specific evidentiary or analytical standards. *See* FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 182-84 (Alan M. Ruben ed., 6th ed. 2003). Labor arbitrators often are not lawyers, and need not have any specific expertise in the matters they are required to consider. Many arbitrators tend to apply the "law of the shop" derived from federal labor law, *see Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and may not be inclined to, or have the expertise to, faithfully interpret statutory provisions. Several commentators have noted the undesir-

has a particularly difficult burden in trying to vacate an adverse decision by a labor arbitrator. *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). Both before and since *Misco*, courts have been reluctant to reverse arbitration awards involving ERISA disputes, even where it is apparent that the arbitrator misapplied dispositive statutory provisions. *See, e.g., Ladish v. Int'l Ass'n of Machinists & Aerospace Workers*, 966 F.2d 250 (7th Cir. 1992); *UAW v. Keystone Consol. Indus.*, 793 F.2d 810 (7th Cir. 1986).

The decision below also creates significant problems for participants and beneficiaries of ERISA plans. As a matter of ERISA enforcement policy, the DOL takes the position that any arbitrator given authority to interpret benefit plan provisions and make eligibility determinations would become a fiduciary subject to the full scope of ERISA's fiduciary duty rules. *See* DOL Information Letter to Richard Colasurd (March 7, 1984); DOL Information Letter to Richard Weitzman (April 22, 1983); *see also* DOL Advisory Opinion ("A.O.") 82-42A (August 16, 1982) (arbitrator who had discretionary authority over plan administration acted as fiduciary); DOL A.O. 81-50A (June 4, 1981) (arbitrator will become an ERISA fiduciary where the arbitrator's decision would have an "immediate impact on administration of the plan."). This reading finds considerable support in both the DOL regulations and the statutory text. *See* 29 C.F.R. § 2509.75-9 (individual who performs function described with Section 3(21)(A) of ERISA is a plan

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able consequences of this disinclination or inability. *See Note, Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 Yale L. J. 1927 (1996); Harry T. Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, 33 ARB. J. No. 4 at 23 (1978).

fiduciary). 29 U.S.C. § 1002(21)(A). *See also* 29 U.S.C. § 1102(b)(2); 29 C.F.R. § 2509.75-8.

In light of this Court's decision last term in *Metropolitan Life v. Glenn,* it is clear that the act of making a benefit eligibility determination is a fiduciary function subject to ERISA's fiduciary duty rules. That, in turn, would make any arbitrator who issues such a determination an ERISA fiduciary. As a result, arbitrators who decide such issues would be personally liable under Section 409 of ERISA for a claim of breach of fiduciary duty in the event of a claim a party to the dispute, including a plan participant who was disappointed with the decision. As a result of this Court's decision last term in *LaRue,* 128 S.Ct. at 1020, a participant who is disappointed with the arbitrator's decision would be able to bring an action under Section 502 of ERISA to recover damages. The prospect of such litigation, and the inevitable difficulty in obtaining fiduciary insurance, is likely to deter many otherwise stalwart arbitrators from undertaking a task that would expose them to personal liability.

Moreover, a regime in which labor arbitrators were permitted to decide benefits eligibility disputes would raise serious questions as to the appropriate standard of review to be applied in such cases. In the event a plan participant lost in arbitration, the logic of the decision below would mean that the participant's appeal of the decision would be decided under the extremely deferential standard for reviewing labor arbitration awards articulated in *Paperworkers v. Misco, Inc.* Such an outcome simply cannot be reconciled with the requirement of Section 503 of ERISA that decisions of plan administrators be subject to "full and fair review." 29 U.S.C. § 1133. *Metropoli-*

*tan Life v. Glenn* directs that such decisions should be reviewed under the far less deferential standards articulated by the Court in that case. *See generally Rush Prudential*, 536 U.S. 383-83, 395-96 (Thomas, J. dissenting) ("arbitral-like procedure" provided by state law should be preempted because it "evicerates the uniformity of ERISA remedies," and granting an arbitrator free-ranging authority to interpret benefit plan documents and issue binding decisions would not provide the "full and fair review" required under ERISA).

The issue of whether labor arbitrators are properly equipped to resolve disputes involving employees' statutory rights seems to be squarely presented to this Court in *14 Penn Plaza v. Pyett*. There is good reason to question whether labor arbitration is the best forum in which to resolve independent federal statutory claims raised in the context of a collective bargaining agreement. Brief of *Amicus Curiae* of The National Academy of Arbitrators In Support of Respondents, *14 Penn Plaza v. Pyett*, No. 07-581 (U.S. Jun. 27, 2008) (noting that "the skepticism the Court expressed in *Gardner-Denver* for the suitability of submitting statutory claims to preclusive resort to a collective agreement's grievance procedure persists – and rightly."); *see also* Joseph Krislov, *Entry and Acceptability in the Arbitration Profession: A Long Way to Go*, LABOR ARBITRATION IN AMERICA: THE PROFESSION IN PRACTICE ch. 4 (Mario Bognanno & Charles Coleman eds., 1992) (almost 40% of labor arbitrators are trained in industrial relations, not law).

This case presents similar concerns about the statutory rights of ERISA plan sponsors as well as participants and beneficiaries. There is substantial reason to believe that resolution of disputes involving

these statutory rights is not appropriate for labor arbitration. Commentators have documented the potential undesirable policy consequences of having disputes implicating important public rights relegated to a private dispute resolution procedure lacking meaningful appellate review. *See, e.g., Note, Arbitrating Novel Legal Questions: A Recommendation for Reform,* 105 Yale L. J. 1927 (1996).[6]

### B. The Court Should Harmonize the Presumption of Arbitrability with ERISA in Order to Protect the Legitimate Expectations of ERISA Plan Sponsors

This Court has had prior occasion to harmonize other federal statutory schemes with ERISA. *See, e.g., Guidry v. Sheet Metal Workers,* 493 U.S. 365 (1990). (Labor-Management Reporting and Disclosure Act); *Shaw v. Delta Airlines,* 463 U.S. 85 (1983) (Pregnancy Discrimination Act); *John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank,* 510 U.S. 86 (1993) (bankruptcy law). The

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[6] The extent to which employers may be required to arbitrate disputes involving benefit eligibility issues under ERISA plans is an important and recurring problem, particularly for employers with benefit plans covering both union-represented and non-represented employees. *See, Crown Cork,* 501 F.3d at 919-20. (rejecting union claim to compel arbitration of dispute over modification of retiree health care plans); *Exelon Generation Co. v. Int'l Broth. Elec. Workers, Local 15,* 540 F.3d 640, 649 (7th Cir. 2008) (compelling arbitration of dispute over employer changes to retiree medical programs even though retirees not part of bargaining unit covered by the relevant collective bargaining agreement); *Rohm & Haas,* 522 F.3d at 335-36 (rejecting arbitration of dispute over benefits in sickness and disability plan covering union and non-union employees, despite Union characterization of the dispute as a contract violation). Current economic conditions all but guarantee a significant increase of such disputes.

Court's decisions have identified significant limitations on the presumption of arbitrability. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (presumption does not apply to employee claims under federal employment statutes such as Title VII; collective bargaining does not waive such claims in the absence of a "clear and unmistakable waiver"); *Litton Fin. Printing*, 501 U.S. at 209 (presumption does not apply in the context of an expired collective bargaining agreement); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 372 (1984) (no presumption of arbitrability in dispute between trustees of multiemployer pension fund and employers over delinquent contributions to the fund).

This case provides an appropriate vehicle for the Court to harmonize the presumption of arbitrability with the ERISA principles summarized herein. As in *Wright, Litton Financial* and *Schneider*, the presumption of arbitrability should not be extended here to create an outcome that both imposes substantial additional burdens on plan sponsors like DuPont and threatens the rights of participants and beneficiaries to a full and fair review of an adverse decision concerning benefit eligibility.

In accommodating two federal statutory schemes, the Court must give full effect to both statutes. *Morton v. Mancari*, 417 U.S. 535 (1974). The proper accommodation here should avoid an outcome by which the employer is subjected to the vagaries of litigation in a variety of jurisdictions. *See Kennedy v. Plan Administrator for DuPont Savings & Inv. Plan*, No. 07-636, *cert. granted*, 128 S. Ct. 1225 (U.S. Feb. 19, 2008). It is likewise necessary to avoid a result that will create additional uncertainty for participants and beneficiaries with respect to the legal standards

to be used by courts in evaluating benefit eligibility disputes.

This case presents a direct collision between the presumption of arbitrability and an employer's rights and obligations under ERISA. The collision can be avoided only by a decision by this Court reversing the decision below and holding that disputes regarding important statutory rights should not be subject to the vagaries of labor arbitration.[7]

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[7] Reversal of the decision below would not leave the Union without a remedy on its breach of contract claim. Section 301 authorizes a union to bring an action directly in federal court claiming breach of a collective bargaining agreement. Where, like here, the underlying dispute is not arbitrable, the exhaustion requirement first articulated in *Republic Steel v. Maddox*, 379 U.S. 650 (1965) is not applicable.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 24, 2008

# APPENDIX

**APPENDIX A**

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 07-2075

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E.I. DUPONT DE NEMOURS & COMPANY,
*Plaintiff - Appellant*,

v.

AMPTHILL RAYON WORKERS, INCORPORATED,
*Defendant - Appellee*.

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Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, District Judge. (3:07-cv-00052-HEH)

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Argued: May 14, 2008 Decided: August 25, 2008

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Before TRAXLER, GREGORY, and SHEDD, *Circuit Judges*.

GREGORY, *Circuit Judge*:

E.I. DuPont de Nemours & Co., ("DuPont") appeals the district court's decision denying its motion for summary judgment and partially granting Ampthill Rayon Workers Incorporated's ("ARWI") cross motion for summary judgment. We affirm.

I.

We adopt the facts as set out by the district court, *see E.I. DuPont de Nemours and Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp.2d 588 (E.D.Va.

2007), and summarize only the facts relevant to the parties' dispute.

DuPont offers its employees throughout the country, union and non-unionized, a number of benefit plans ("plans"), all of which are governed by ERISA, 29 U.S.C. § 1001 *et seq.*, with the exception of the Vacation Plan.[1] In August 2006, DuPont sent out a memorandum to all of its employees informing them about amendments to the plans. Some of the amendments decreased the benefits available to the employees under the plans.

ARWI represents about 1000 DuPont employees who work at DuPont's Spruance Fibers Plant in Ampthill, Virginia. These employees come from the Production and Maintenance Unit and the Clerical, Technical, and Office Unit. While employees in each unit signed separate Collective Bargaining Agreements ("CBAs") with DuPont, for purposes of this dispute, the relevant provisions from each CBA are the same.

As a result of DuPont's 2006 amendments ("amendments") to the plans, ARWI, following the procedures outlined in the CBAs, initiated a grievance against DuPont alleging that the amendments violated the CBAs.[2] While DuPont initially agreed to arbitrate the dispute, it subsequently reversed course and filed a Complaint in federal district court. Shortly thereafter, DuPont submitted an Amended Complaint

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[1] The Vacation Plan is not relevant to this case.

[2] For example, ARWI claims DuPont violated Article VII, Section 1 of the CBAs which provides that "any changes in the [benefit plans], which had the effect of reducing or terminating benefits will not be made effe( ive until one year (1) after notice to the Union by the Company of such changes." (J.A. 332.)

seeking a declaratory judgment stating, *inter alia*, that ARWI should resolve its grievance by utilizing each plan's internal claim procedure or in the alternative, by filing a civil suit in federal court under Section 502(a) (1) (B) of ERISA, 29 U.S.C. § 1132(a) (1) (B).[3] In addition, DuPont sought injunctive relief barring ARWI from resolving its grievance in arbitration. ARWI filed a Counterclaim alleging that the amendments violated the CBAs and seeking a ruling requiring DuPont to litigate ARWI's grievance in arbitration.

The parties then filed cross motions for summary judgment. DuPont argued, *inter alia*, that since the amendments implicated the terms, conditions, eligibility and interpretation of the plans, ARWI's grievance should be resolved according to each plan's internal dispute mechanism. ARWI submitted that Article XI, Section One of the CBAs ("the arbitration clause") mandates that the grievance proceed to arbitration. The arbitration clause states, in pertinent part, that "[a]ny question as to the interpretation of this Agreement, or as to any alleged violation of the terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, shall at the request of either party be submitted to arbitration." (J.A. 344, 380.)

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[3] Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

The district court held that the parties' dispute was arbitrable on account of the arbitration clause's wide breadth, the lack of any explicit language in the CBAs excluding ARWI's grievance from arbitration, and the absence of "forceful evidence" that the parties wished to exclude the disputes from arbitration. DuPont appeals the district court's judgment.[4]

A.

The question posed here is whether ARWI's grievance, alleging that the amendments to its employees' plans breached the parties' CBAs, is arbitrable. We review a district court's grant of summary judgment de novo, viewing all of the facts in the light most favorable to the non-movant. *See, e.g., EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir.2005).

Through a series of three cases, known as the "Steelworker's Trilogy," the Supreme Court set out several principles to aid lower courts in determining whether an employer-union dispute is subject to arbitration. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *Steelworkers*

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[4] Shortly after the district court's decision, three other district courts decided the same issue. Relying on reasoning similar to that of the district court in this case, the three district courts held that the unions' claims were subject to arbitration. *See United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Local Union 943 v. E.I. DuPont de Nemours & Co.*, Case No. 1:07-cv-1005-00965-RBK-JS (D.N.J. February 29, 2008); *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Local 4-5025 v. E.I. DuPont de Nemours & Co.*, Case No. 07-cv-122s (W.D.N.Y. March 18, 2008); *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Serv. Workers Local 4-5025 v. E.I. DuPont de Nemours & Co.*, Case No. 07-cv-126-JJF (D. Del. April 18, 2008).

*v. American Mfg. Co.*, 363 U.S. 564 (1960), and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Supreme Court first emphasized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf Navigation Co.*, 363 U.S. at 582. "The second rule, which follows inexorably from the first, is that the question of arbitrability-whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination." *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

Third, in reviewing whether the parties claims are arbitrable, "a court is not to rule on the potential merits of the underlying claims." *Id.* at 649. This mandate applies "even if [the union's grievance] appears to the court to be frivolous," *id.* at 649-50, as the court must limit its inquiry to whether the union's claims are arbitrable. Finally, "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 650 (emphasis added). This "presumption is particularly applicable," *id.*, where the arbitration clause is "broad." *Id.* Consequently, "'absen[t] [] any express provision excluding a particular grievance from arbitration . . . only the *most forceful evidence* of a purpose to exclude the claim from arbitration" will

suffice. *Id.* (quoting *Warrior & Gulf*, 363 U.S. at 584-85) (emphasis added).

B.

DuPont contends that the district court erred in three respects: (1) the district court failed to grasp that since ARWI's breach of contract grievance is inextricably linked with benefit eligibility determinations, it should be resolved under each plan's dispute resolution procedure; (2) the district court did not take into account dispositive language from Article VII of the CBAs limiting what disputes are subject to arbitration; and (3) the district court "failed to apply governing ERISA principles applicable to the resolution of employee benefit eligibility issues and other plan interpretation issues implicated by the grievance." (Appellant's Br. 13.)

The cornerstone of DuPont's argument is that the amendments concern the *eligibility* of claimants to receive benefits under the plans, and as such, they do not implicate the CBAs. Specifically, DuPont contends that in resolving the parties' dispute, an arbitrator would be forced to determine whether individuals affected by the amendments are eligible for benefits, a decision tasked solely to the plan administrator. Such an action would also be inconsistent with the CBAs, and specifically, Article VII, Sections 1 and 3, which states in relevant part:

> Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications

> thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges.
>
> Section 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan, subject to all terms and conditions of said Plan . . . .

(emphasis added). DuPont states that the "subject to" language in Article VII was included in the CBAs in order "to ensure that [DuPont] retain[ed] the flexibility to amend these plans without having to negotiate over subsequent plan amendments at particular unionized facilities." (Appellant's Br. 7.) By filing a grievance, DuPont argues that ARWI is attempting an "end round" the plans' dispute resolution procedures and Section 502(a)(1)(B) of ERISA, which provide the exclusive remedies for employees seeking, enforcing, or clarifying their benefits under the terms of each plan. Since the terms of each plan grant the plan administrator[5], acting as an ERISA fiduciary, the sole right and discretion to make benefit eligibility determinations, and the resolution of ARWI's grievance necessarily involves eligibility determinations, DuPont concludes that ARWI must resolve its grievance through each plan's internal dispute procedures or in the alternative, through a civil action in federal court.

ARWI surmises that since its grievance is limited to "whether DuPont exceeded the external restraints imposed by the CBA . . . when it amended the plans"

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[5] DuPont is the plan administrator for all plans except the Pension and Retirement Plan.

(Appellee's Br. 13), the dispute clearly falls within the broad reach of the arbitration clause. In addition, parroting the district court's reasoning, ARWI states that the plans' internal dispute resolution mechanisms are designed to handle "routine benefit eligibility determinations" (Appellee's Br. 14) not for interpreting the obligations of each party under the CBAs. Finally, ARWI contends that arbitration is the only suitable forum to resolve the merits of its claim as ERISA does not provide employees with "a mechanism" to bring their grievances before a federal court.

Based on the guidance provided by the Supreme Court, there can be little doubt that ARWI's claims are arbitrable. Here, like in *AT&T*, the CBAs contain a broad "standard arbitration clause," *id.* at 647, that allows "any question as to the interpretation of the [CBA] or as to any alleged violation of the [CBA]" to be settled by arbitration. (emphasis added). Frankly, it is difficult to envision a broader arbitration clause. It is unfathomable that either of the parties could assume that the "subject to" language in Article VII would override the overarching arbitration clause in Article XI of the CBAs. This conclusion is even more convincing in light of the fact that the parties chose to explicitly exclude arbitration as a forum for resolving certain types of disputes. For example, the CBAs preclude an employee disputing his discharge (J.A. 334) or the denial of a promotion from proceeding to arbitration. (J.A. 336-337.) Initially, even DuPont felt ARWI's grievance was subject to arbitration, and it went so far as to agree on an arbitrator; yet, DuPont suddenly changed its mind, refusing to arbitrate and instead initiated this action in federal court.

While it is true that the result of the plans' amendments will decrease the benefits available to

certain DuPont employees, ARWI's breach of contract claims are premised on the fact that such changes *violate the terms of the CBAs*. As a result, DuPont's argument that the amendments affect an employee's eligibility to receive benefits under the plans, while true, is inapposite to the issue of what forum should determine whether the amendments violated the CBAs.

Additionally, DuPont has not provided "forceful evidence," much less "the most forceful evidence," that the parties' intended to submit an employee's claims alleging violations of the CBAs to the plan administrator or to a federal court. The presumption of arbitrability is particularly strong in this case due to the wide reaching arbitration clause and the lack of any explicit language in the CBAs excluding the claims at issue here from arbitration. Whatever limited doubt exists as to the parties' intentions must be resolved in favor of arbitration. Also, sending this grievance to an arbitrator is hardly inconsistent with ERISA (despite DuPont's claims to the contrary), and quite frankly is the only option that conforms to the mandates of the Supreme Court. Because there is no doubt that the arbitration clause is susceptible to an interpretation that covers ARWI's grievance, arbitration is the proper forum to resolve this dispute.[6]

II.

For the reasons above, we affirm the district court's decision.

*AFFIRMED*

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[6] Our decision is purposely bereft of any analysis as to the merits of ARWI's claims, as even frivolous claims are subject to arbitration. *AT&T*, 475 U.S. at 654-55.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

[Filed SEP. 24, 2007]

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Civil Action No. 3:07CV52-HEH

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E.I. DUPONT DE NEMOURS AND COMPANY,
*Plaintiff*,

v.

AMPTHILL RAYON WORKERS, INC.,
*Defendant*.

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AMPTHILL RAYON WORKERS, INC.,
*Counterclaimant*,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Counterclaim Defendant*.

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MEMORANDUM OPINION
(Granting-in-Part and Denying-in-Part Parties' Cross-Motions for Summary Judgment)

This is a labor dispute involving the arbitrability of changes made to ERISA benefit plans under the terms of a collective bargaining agreement. It is currently before the Court on motions for summary judgment filed by each of the parties. Both parties have filed memoranda of law in support of their respective positions. The Court heard oral argument on September 12, 2007. Finding no material issues of

fact in dispute, the Court will grant-in-part and deny-in-part the Cross-Motions for Summary Judgment.

## I. Background

E.I. DuPont de Nemours and Company ("DuPont") employs approximately 30,000 employees at various facilities nationwide of which 4,500 are unionized. (Stip. ¶ 1.) One of those DuPont facilities is the Spruance Fibers Plant in Ampthill, Virginia. Approximately 1,000 employees at Spruance are represented by Ampthill Rayon Workers Incorporated ("ARWI" or "Union"). (Compl. ¶¶ 2, 6.) ARWI represents employees in the Production and Maintenance unit at the Spruance facility as well as employees in the Clerical, Technical, and Office Unit. (Stip. ¶ 3.) The unionized employees in the Production and Maintenance unit at Spruance have been covered by a collective bargaining agreement with DuPont since September 1, 1999, and that agreement has been renewed automatically every September since that date. *Id.* The ARWI-represented employees in the Clerical, Technical, and Office unit are contracted under a similar collective bargaining agreement that was first effective in October of 1999 and renewed annually. *Id.* The two collective bargaining agreements differ somewhat, but the parties agree that the portions of each agreement relevant to this dispute are identical.[1] *Id.* Those relevant portions of the agreement will be referred to through out this memorandum opinion as the Collective Bargaining Agreement ("CBA").

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[1] The portions of the CBA relevant to this action are "Article VII-Industrial Relations Plans and Policies" and "Article XI-Arbitration." (Stip. Ex. C1, C2.)

DuPont offers several benefit plans to qualifying employees and retired employees nationwide. These plans are offered uniformly in all DuPont facilities irrespective of an employee's union status. The benefit plans include the Savings and Investment Plan ("SIP") (Amend. Compl. ¶ 11), the Pension and Retirement Plan ("Pension Plan") (Amend. Compl. ¶ 18), the BeneFlex Employee Life Insurance Plan ("Life Insurance Plan") (Amend. Compl. ¶ 19), the Medical Care Assistance Plan ("MedCAP") (Amend. Compl. ¶ 27), the Dental Assistance Plan ("Dental Plan") (Amend. Compl. ¶ 31), the Vacation Plan (Amend. Compl. ¶ 38), and the BeneFlex Vacation Buying Plan ("Vacation Buying Plan") (Amend. Compl. ¶ 35). All of the benefit plans are governed by ERISA, 29 U.S.C. §1001 *et seq.*, with the exception of the Vacation Plan. (Amend. Compl. ¶¶ 11, 18, 23, 27, 31.) It is the amendment of these seven benefit plans by DuPont that is the subject of this action.

The parties' CBA discusses benefit plans in "Article VII- Industrial Relations Plans and Practices." Article VII of the CBA is central to this action and warrants partial reprinting:

> Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges; provided, however, that as long as one of these COMPANY

Plans and Practices is in effect at any other Plant within the Company it shall not be withdrawn from the employees covered by this Agreement, and provided, further, that any change in these Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change.

Short-Term Disability Plan
Pension and Retirement Plan
Special Benefits Plan
Vacation Plan for Wage Roll Employees

* * * *

Savings and Investment Plan
Total and Permanent Disability Income Plan
Career Transition Plan

* * * *

Section. 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan, subject to all tetins and conditions of said Plan, provided, however, that as long as this Plan is in effect at any other Plant within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement."

(ARWI Brief at 3-4.) Neither MedCAP nor the Dental Plan are referenced in the CBA.

A. *DuPont's August 2006 Amendments to the Benefit Plans*

DuPont announced several changes to its benefit plans in a memorandum dated August 28, 2006. (Stip. ¶ 40.) The changes were applicable to all employees nationwide, union and non-union, not merely to employees at the Spruance Fibers Plant. (Stip. ¶ 41.) Some of the changes outlined in the memorandum provided additional or augmented benefits than were previously provided by DuPont, but several of the amendments outlined in the August 2006 memorandum amounted to a significant reduction in employee benefits.

The August 2006 memorandum prescribed that employees hired by DuPont on or after January 1, 2007 would no longer be eligible to participate in the SIP, but would be able to enroll in a similar plan known as the Retirement Savings Plan. (Stip. ¶ 42.) Employees that participate in the Retirement Savings Plan are entitled to contribute up to 100% of their salary into the plan and to receive a 100% matching contribution of that amount from DuPont for up to 6% of their pay. (Stip. ¶ 42.) DuPont will also make an additional contribution to a participating employee's Retirement Savings Plan account equal to 3% of the employee's pay. *Id.*

The new Retirement Savings Plan matching rules differ from those that apply to employees hired prior to 2007 participating in SIP. The SIP-eligible employees can contribute up to 100% of their salary to SIP and receive a 50% matching contribution from DuPont on up to 3% of the employee's salary. There is no separate 3% contribution available to employees participating in SIP. *Id.*

The Pension Plan was amended such that employees hired by DuPont on or after January 1, 2007 are ineligible to accrue benefits under the Pension Plan for service after that date. (Stip. ¶ 43.) The August 2006 memorandum further announced that, for Pension Plan purposes, service accrued after December 31, 2007 by employees that were hired prior to January 1, 2007 would be credited at one third the previous accrual rate. *Id.*

The August 2006 memorandum provided that employees hired by DuPont after January 1, 2007 were ineligible to participate in the Life Insurance plan following retirement. (Stip. ¶ 44.) Employees hired after January 1, 2007 would also be ineligible to participate in MedCAP and the Dental Plan. (Stip. ¶¶ 45, 46.) DuPont altered its Vacation Plan in the August 2006 memorandum by limiting employees hired after January 1, 2007 to a maximum benefit of five weeks of vacation time annually and limiting the amount of time that could be banked to three weeks. (Stip. ¶ 47.) Finally, DuPont announced that employees hired after January 1, 2007 would not be eligible to purchase vacation time utilizing the Vacation Buying Plan after their first ten years of employment. (Stip. ¶ 48.)

B. *ARWI's Demand for Arbitration Prompts DuPont to File this Complaint*

ARWI maintains that the amendments to employee benefit plans contained in DuPont's August 2006 memorandum violate the parties' CBA. (Answer ¶ 2.) The Union responded to DuPont's announcement by initiating a grievance on November 7, 2006 utilizing the grievance procedures established in the CBA. (Stip. ¶ 50.) ARWI's grievance contends that DuPont violated the CBA by (1) not waiting one year to

implement the August 2006 amendments; (2) treating one class of employees, namely those hired after January 1, 2007, different from other employees; and (3) reducing benefits.[2] (Stip. Ex. R.) The Union was unable to resolve its grievance with DuPont and demanded arbitration of the dispute pursuant to the CBA. (Stip. ¶ 51.)

ARWI insists that the arbitration clause contained in Article XI of the parties' CBA requires submission of this dispute to an arbitrator. The arbitration clause states in pertinent part that "[a]ny question as to the interpretation of this Agreement, or as to any alleged violation of the terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, shall at the request of either party be submitted to arbitration." (Stip. Ex. C1 at 28.)

DuPont originally agreed to submit the grievance to arbitration and the parties selected an arbitrator on January 23, 2007. (Stip. ¶ 52.) Subsequently, DuPont refused to arbitrate the dispute and initiated this action seeking declaratory judgment and injunctive relief on January 24, 2007. DuPont amended its Complaint on March 14, 2007 to include three counts.

Count I of DuPont's Amended Complaint asks for a declaration that all disputes regarding ARWI members' eligibility for ERISA benefit plans must be resolved through the claims procedures contained in the benefit plans themselves or through a civil ac-

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[2] ARWI also maintains that DuPont made unilateral changes to the structure of employee benefits without first bargaining to impasse as required by the National Labor Relations Act. (Stip. Ex. R.) That complaint has been pursued separately with the NLRB.

tion under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), rather than through arbitration. (Amend. Compl. ¶¶ 50-53.) Count II requests a declaration that the amendments made by DuPont to the ERISA benefit plans were consistent with the rights afforded to DuPont under the parties' CBA. (Amend. Compl. ¶¶ 54-56.) Count III of the Amended Complaint asks the Court for a permanent injunction ordering ARWI to refrain from seeking arbitration of its grievance if the Court issued the declaratory judgments asked for in Counts I and II. (Amend. Compl. ¶¶ 57-58.)

ARWI filed a Counterclaim on March 19, 2007 under the Labor Management Relations Act, 29 U.S.C. § 185, alleging a violation of the parties' CBA and asking the Court to compel DuPont to submit the dispute to arbitration. The parties filed cross-motions for summary judgment on June 29, 2007. Contained in agreed stipulations filed with the Court on the same date was a willingness on the part of DuPont to submit the Vacation Plan, the only benefit plan at issue in this litigation that is not governed by ERISA, to arbitration. (Stip. ¶ 55.)

## II. Standard of Review

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986). The standard of review does not change when ruling on cross-motions for summary judgment. The motions are evaluated separately against the Rule 56 stand-

ard. *Monumental Paving & Excavating, Inc. v. Pa. Mfrs. Ass 'n Ins. Co.*, 176 F.3d 794, 797 (4th Cir. 1999).

## III. Analysis

### A. *DuPont's Characterization of the Grievance as Involving Benefits Eligibility Determinations*

Count I of DuPont's Amended Complaint asks for (1) a "prompt declaration that all disputes regarding eligibility for certain benefits contained in DuPont's ERISA plans are to be resolved exclusively through the procedures set forth in those plans, and/or in a civil enforcement action under Section 502 of ERISA"; (2) that "the ARWI grievance is not arbitrable"; and (3) that "otherwise delineates the rights and obligations of the parties." (Amend. Compl. ¶ 53.)

DuPont's first request, that "all disputes regarding eligibility for certain benefits contained in DuPont's ERISA plans" be resolved through a plan's internal procedures or civil action, is unobjectionable as phrased. ARWI concedes that it cannot grieve and arbitrate benefit eligibility and claims decisions. (ARWI Brief at 23.) The Court also does not quarrel with the notion that benefit eligibility decisions are to be contested solely through internal plan resolution processes or a civil action under ERISA. Several cases support that proposition. *See, e.g., USW v. Commonwealth Aluminum Corp.*, 162 F.3d 447 (6th Cir. 1998) (finding union grievance over health plan requiring referrals for non-routine OB/GYN care was not subject to arbitration under the CBA); *Intl Ass 'n of Machinists, Dist. No. 10 v. Waukesha Engine Div.*, 17 F.3d 196, 197 (7th Cir. 1994) (denying arbitration under the CBA when health plan determined that inpatient hospital stay was not medically necessary);

*Schweizer Aircraft Corp. v. Local 1752, Intl Union, United Auto., Aerospace & Agric. Implement Workers*, 29 F.3d 83, 86 (2d Cir. 1994) (determining court's critical inquiry in ordering arbitration is whether dispute implicates the responsibilities of the Plan's administrators or only the responsibility imposed under the CBA).

DuPont has unnecessarily muddied the waters by omitting the predicate question of whether ARWI's grievance is properly characterized as a dispute over benefit eligibility determinations. DuPont has labored from the outset of this litigation to label this as a dispute concerning "eligibility for benefits." (Amend. Compl. ¶ 3.) The company has done so to seek shelter in the line of cases cited above, holding that disputes over eligibility for benefits under ERISA plans are to be settled by plan administrators acting as ERISA fiduciaries or civil suits, rather than by arbitration under the CBA. DuPont has candidly informed the Court that because the August 2006 amendments affected all employees nationwide, the company potentially faces a quagmire of grievances and litigation from every labor union that represents a DuPont employee.[3] Motivated by a desire to avoid this impending storm, DuPont has tried to construe this grievance as a dispute over benefits eligibility, but the company has mischaracterized ARWI's grievance.

Benefit eligibility determinations are routinely made by employers in their role as ERISA fiduciaries. The cases cited by DuPont involve typical benefit eligibility determinations by plan administrators

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[3] At oral argument, DuPont stated that three other suits similar to this one were ongoing elsewhere.

such as determining whether medical necessity exists for a given procedure or requiring a referral before certain diagnostic tests will be reimbursed. *USW*, 162 F.3d 447; *Intl Ass 'n of Machinists*, 17 F.3d 196. All parties agree that those types of determinations are squarely within the province of an ERISA fiduciary and should be resolved by a plan's internal claims review process or a civil action under ERISA. (ARW1 Brief at 5.)

The amendments made to benefit plans by DuPont at issue here are of a wholly different nature than routine benefit eligibility determinations. They are not akin to an individual finding that medical necessity was lacking or a requirement for a referral. DuPont has not administered the plans, they have altered them. The company goes a long way in recognizing this difference when it admitted at oral argument that it was acting in its capacity as plan settlor when it amended the plans, not in its fiduciary role as plan administrator.

ARWI's grievance in this case is not a complaint over a benefit eligibility determination nor the Union attempting to circumvent any requirement of ERISA.[4] This Court could issue a declaration, as DuPont requests, that "all disputes regarding eligibility for certain benefits contained in DuPont's ERISA plans are to be resolved exclusively through the procedures set forth in those plans and/or in a civil enforcement action," but it would be fruitless in resolving this dispute as this is not a dispute over eligibility for benefits. ARWI's grievance is quite

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[4] At the hearing, ARWI conceded that nothing in ERISA prevents DuPont from acting as plan settlor and amending the benefit plans as they did.

simply that DuPont's August 2006 amendments violated the parties' CBA and should be arbitrated. The Court will therefore decline to issue the first declaration requested by DuPont in Count I of the Amended Complaint and turns now to the issue of arbitrability.

DuPont asks in Count I for a declaration that the grievance is not arbitrable. ARWI's counterclaim asks that the dispute be referred to arbitration. Resolving the issue requires a short review of case law and an examination of the CBA.

B. *Presumption of Arbitrability*

ARWI insists that the amendments to benefits plans announced by DuPont in August of 2006 violate the CBA and that the CBA itself requires submission of the dispute to an arbitrator. The Court's role in determining the arbitrability of a labor dispute is not to rule on the potential merits of the underlying claim, but to determine whether the party seeking arbitration is entitled to it by the CBA. *See United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

Arbitration is a matter of contract and a party cannot be forced to arbitrate any disagreement that it did not agree to submit to arbitration. *AT&T Tech., Inc. v. Commc'n Workers of America*, 475 U.S. 643, 648 (1986). The Supreme Court has made it very clear though that "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 650. Any

doubts regarding the coverage of the arbitration clause are to be resolved by this Court in favor of arbitration. *Id.*

The arbitration clause contained in the parties' CBA casts a wide net. The parties agreed to arbitrate "any question as to the interpretation of this Agreement or as to any alleged violation of the terms of this Agreement . . . which is not otherwise settled to the mutual satisfaction of the parties." (Stip. Ex. C1, C2.) The presumption in favor of arbitrability outlined in *Steelworkers* is strengthened when an arbitration clause is broadly written. *AT&T Tech.*, 475 U.S. at 650. When a broad arbitration clause is present in the CBA and no express provision excludes a particular grievance from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Wash. Square Secs. v. Aune*, 385 F.3d 432, 436 (4th Cir. 2004). This Court cannot resolve a labor dispute on the merits, even a frivolous one, absent forceful evidence that the parties exempted the dispute from the arbitration clause. *Id.; United Steelworkers*, 363 U.S. at 568.

C. *The Parties' CBA*

Having established a strong presumption in favor of arbitrability, this Court's inquiry has two facets. The first question is whether the immediate dispute between DuPont and ARWI is over the interpretation of the CBA or an alleged violation of the terms of the CBA. If so, then the dispute is within the province of the CBA's arbitration clause and the next question is whether the CBA contains any "forceful evidence" that would provide this Court with "positive assurance" that the parties intended to exempt this dispute from the broad arbitration procedures prescribed in the CBA. Both questions can be resolved

quickly through an examination of Article VII of the CBA.

Article VII provides that SIP, the Pension Plan, the Life Insurance Plan, the Vacation Plan, and the Vacation Buying Plan will all be offered to ARWI members so long as they are offered to any other DuPont employee nationwide.[5] (Answer ¶ 7.) Article VII appears further to grant DuPont latitude in modifying the plans as needed and states that any change to the enumerated benefit plans that effectively reduces the benefits of DuPont's ARWI employees may not take effect for one year after they are announced. *Id.* That is the full extent of the CBA's discussion of the benefit plans at issue here.

The language of Article VII is sufficient to convince this Court that the dispute between ARWI and DuPont over the August 2006 amendments to benefit plans is, at bottom, a dispute over the rights afforded DuPont in the CBA to modify the benefit plans listed in that article. Resolving the dispute would necessarily require this Court to interpret the CBA and determine the rights afforded to each party therein.[6] The arbitration clause plainly provides that "any question as to the interpretation" of the CBA must be submitted to arbitration. Accordingly, the dispute

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[5] MedCAP and the Dental Plan are not referred to in the CBA and their arbitrability is dealt with separately.

[6] Count 11 of DuPont's Amended Complaint specifically asks the Court for a declaration that the plan amendments "were consistent with DuPont's rights under the parties' collective bargaining agreement, and that those actions do not violate the AWRI collective bargaining agreement." (Amend. Compl. ¶ 17.) The Court cannot provide DuPont with the relief requested without interpreting the CBA and adjudicating an alleged violation of the CBA.

must be submitted to arbitration unless evidence sufficient to overcome the presumption in favor of arbitrability can be found proving that the parties intended to exempt this dispute from the broad arbitration clause contained in Article XI.

There is no reference in the CBA or elsewhere, let alone an express statement, that serves to exempt the provision of benefit plans from the arbitration procedures contained in the CBA. Finding no unambiguous sign that ARWI and DuPont exempted the amendment of benefit plans listed in Article VII of the CBA from the arbitration procedures listed in Article XI, this Court must order the parties to submit to arbitration the narrow question of whether the August 2006 amendments to SIP, the Pension Plan, the Life Insurance Plan, the Vacation Plan, and the Vacation Buying Plan violate the CBA. The ability to amend the above plans may be well within DuPont's rights but the parties' CBA grants that determination to an arbitrator and not to this Court.

D. *The MedCAP Plan and Dental Plan*

Neither the MedCAP Plan nor the Dental Plan is referenced in the CBA. The CBA's arbitration clause only mandates arbitration of those disputes that arise from the CBA. Since neither plan is included in the CBA, the parties cannot be said to have contracted to arbitrate disputes over these two plans. Mindful again that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit," *Steelworkers*, 363 U.S. at 582, this Court has no power to order arbitration of this dispute insofar as it concerns the August 2006 amendments to MedCAP and the Dental Plan. The parties indicated at oral argument that they had collectively reached

the same conclusion. DuPont will be granted an injunction preventing ARWI from further seeking arbitration of the amendments to these two plans.

## IV. Conclusion

For the reasons stated above, ARWI's Motion for Summary Judgment will be granted-in-part and the parties will submit AWRI's grievance over the August 2006 amendments of SIP, the Pension Plan, the Life Insurance Plan, the Vacation Plan, and the Vacation Buying Plan to arbitration pursuant to the parties' CBA.

DuPont's Motion for Summary Judgment will be granted-in-part and ARWI may not pursue arbitration of the August 2006 amendments to MedCAP and the Dental Plan.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry E. Hudson
HENRY E. HUDSON
United States District Judge

ENTERED this 21st day of Sept. 2007.
Richmond, VA

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

[Filed SEP. 24, 2007]

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Civil Action No. 3:07CV52-HEH

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E.I. DUPONT DE NEMOURS AND COMPANY,
*Plaintiff*,

v.

AMPTHILL RAYON WORKERS, INC.,
*Defendant*.

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AMPTHILL RAYON WORKERS, INC.,
*Counterclaimant*,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Counterclaim Defendant*.

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FINAL ORDER
(Granting-in-Part and Denying-in-Part Parties' Cross-Motions for Summary Judgment)

THIS MATTER is before the Court on the parties' Cross-Motions for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure filed on June 29, 2007.

For the reasons set forth in the accompanying Memorandum Opinion, ARWI's Motion for Summary Judgment is GRANTED-in-PART. The parties will submit ARWI's grievance over amendments to SIP, the Pension Plan, the Life Insurance Plan, the Vaca-

tion Plan, and the Vacation Buying Plan to arbitration pursuant to the parties' collective bargaining agreement. ARWI's motion is DENIED with regard to MEDCap and the Dental Plan.

DuPont's Motion for Summary Judgment is GRANTED with respect to ARWI's grievance over amendments to MEDCap and the Dental Plan. ARWI will not further pursue arbitration of that grievance. DuPont's motion is DENIED as to SIP, the Pension Plan, the Life Insurance Plan, the Vacation Plan, and the Vacation Buying Plan.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/ Henry E. Hudson
HENRY E. HUDSON
United States District Judge

Date: Sept. 21, 2007
Richmond, VA

## APPENDIX D

AMPTHILL RAYON WORKERS, INC.
5772 HOPKINS ROAD
RICHMOND, VIRGINIA 23234
(804) 275-8074 (Office)
(804) 275-2284 (FAX)
(804) 383-4477 (Plantsite)

Formal Grievance

Grievance # 1-S-06
Violation: Violation of the Contract
Area Director: Irvin
Presentation Date: November 7, 2006

Management Responsible: Ray/Rhodes/Campbell

* This document is not intended to be all inclusive. All comments presented by this committee are part of the official grievance.

**Brief Description of Incident:** On August 28, 2006, the company announced changes to several of the Benefit Plans listed under Article VII, Sections 1 and 3 of the Bargaining Agreement. These changes are set forth in the Company's announcement of the changes.

**Points Brought Out in the Investigation:**

**#1** Article VII, Section 1 of the Bargaining Agreement states in part, "any change in these Plans & Practices, which had the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change".

**#2** There is no provision in the contract language, or in the plans themselves, which provides for one class of employees to be treated differently from another

class of employees (new hires versus existing employees).

**#3** By making changes for employees hired beginning 1/1/07 that includes the following- (1) they will not participate in the pension plan; (2) they will not get a company subsidy for retiree healthcare or life insurance; (3) they will receive a maximum vacation benefit of five weeks; (4) they will be eligible to bank no more than three weeks of vacation; and (5) they will be able to purchase vacation only during the first ten years of employment; the Company is in violation of Article VII, Section 1 and 3 of the Agreement..

**#4** Moreover, by providing an additional SIP benefit in 2007 to the employees hired beginning 1/1/07, which not providing that benefit during 2007 to employees hired prior to that date, the Company is in violation of Article VII, Section 1.

**#5** Finally, by providing that effective 1/1/08 the pension benefit for existing employees (but not for employees hired beginning 1/1/07 who will receive no pension benefit) will continue but at a, rate that is one third of its current level, the Company violated Article VII, Section 1.

**#6** Similarly, the declaration that the Company paid survivor benefit for existing employees (but, again not for employees hired beginning 1/1/07 who will receive no survivor benefit) will not continue to grow with service or pay after December 31, 2007, is also a violation of Article VII, Section 1.

**#7** As a separate matter, by announcing these changes unilaterally, without having first bargained with the Union and without having reached a lawful impasse, the Company not only violated the above contractual language but also violated its duty to

bargain under both the contract (including Article 11, Section 1, 2 and 3) and the National Labor Relations Act.

**Resolution Sought:** Properly bargain any changes. Wait one year for implementation for any changes that negatively impact represented employees.

**APPENDIX E**

[DuPont Logo]
DuPont

DuPont
Spruance Plant
P.O. Box 27001
Richmond, VA 23261

January 25, 2007

Mr. J. T. Palmore
President
Ampthill Rayon Workers, Inc.
5772 Hopkins Road
Richmond, Virginia 23234

Dear Mr. Palmore:

I am writing in response to Grievance No. S-1-06.

We have completed our preliminary review of the grievance. This is to advise you that we consider the grievance to invoke a dispute, on behalf of members of your bargaining unit and/or other individuals who are or have been employed at the facility, as to whether those individuals are eligible for certain benefits under the terms of various employee benefit plans sponsored by DuPont. As you are aware, DuPont has communicated the new eligibility rules to all current employees and continues to communicate these rules to all newly hired employees. We note that any disputes over eligibility for benefits under DuPont's benefit plans must be handled according to the procedures set forth in the relevant plan documents and summary plan descriptions, and/or through a civil enforcement action brought by any adversely affected individual pursuant to Section 502 of the Employee Retirement income Security Act of 1974 ("ERISA").

Please note further that the Plan Administrators of the various ERISA plans sponsored and maintained by DuPont have the ultimate discretionary decision-making authority to determine whether or not individuals, including members of your bargaining unit, are eligible for benefits under the plans. The Plan Administrators are required by ERISA to make such eligibility determination in accordance with the terms of those plans. Claims alleging benefit entitlements inconsistent with the eligibility standards set forth in those plans will therefore be denied. Please also understand that if you wish to challenge any such denial, you must pursue an appeal under the terms of the respective plans. Absent such an appeal, participants and beneficiaries in the various plans will be deemed to have failed to exhaust their administrative remedies, and any claimed entitlements to benefits under the terms of the DuPont plans will be barred. Under ERISA completion of this appeal process is a prerequisite to pursuing any farther legal remedies that may be available.

If you wish to pursue such a claim, you should advise any participant or beneficiary that he/she should follow the claim procedures as detailed in the Summary Plan Description for each of the respective plans.

Disputes over claims for benefits under the DuPont plans are not subject to resolution through the grievance and arbitration provisions of the CBA between your union and DuPont. DuPont is not contractually obligated to submit the above-referenced grievance to arbitration, and DuPont hereby refuses to submit the disputes to arbitration.

If you have any questions or need additional information or documentation, please contact me.

Sincerely,

/s/ Dianne W. Vespucci
DIANNE W. VESPUCCI
Labor Relations Manager

## APPENDIX F

*Clerical, Technical and Office Unit*

AGREEMENT

*Between*

E.I DU PONT DE NEMOURS AND COMPANY

Spruance plant of
Textile Fibers Department

Amphill, Chesterfield County
Virginia

AND THE

AMPHILL RAYON WORKERS, INC
Richmond, Virginia

October 1, 2000

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## ARTICLE VII
## INDUSTRIAL RELATIONS PLANS AND PRACTICES

*Section 1.* All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existed prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the COMPANY or by the Plant to govern such privileges, provided, however, that as long as any one of these COMPANY Plans and Practices is in effect at any other Plant within the COMPANY it shall not be withdrawn from the employees covered by this Agreement, and provided, further, that any change in these Plans and Practices which has the *effect* of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change.

Pension and Retirement Plan
Special Benefits Plan
Vacation Plan
Service Emblem Plan
Continuity of Service Rules
Payment to Employees on Jury Duty
Payment to Employees on State and National Guard Emergency Duty
Treatment of Employees while Engaged in Peacetime Military Training
Savings and Investment Plan
Total and Permanent Disability Income Plan
Short-Term Disability Plan
Career Transition Financial Assistance Plan

*Section 2.* An employee's length of service for consideration of benefits under the COMPANY'S Industrial Relations Plans and Practices shall be his/her continuous service with the COMPANY as calculated in accordance with the COMPANY'S Continuity of Service Rules.

*Section* 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY's BeneFlex Flexible Benefits Plan, subject to all terms and conditions of said Plan, provided, however, that as long as the Plan is in effect at any other Plant within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement.

* * * * *

## ARTICLE XI
## ARBITRATION

*Section 1.* Any question as to the interpretation of this Agreement, or as to any alleged violation of the

terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, shall at the request of either party be submitted to arbitration.

*Section 2.* After the UNION and the COMPA-NY have executed the submission agreement, the party, requesting arbitration shall request a panel of five (5) arbitrators from the American Arbitration Association (AAA). The UNION shall strike off two (2) names within a period of seven (7) calendar days following receipt of panel names and shall forward the list to the COM-PANY who shall strike off two (2) names within seven (7) calendar days following receipt thereof. The remaining name shall be the arbitrator. The award by the arbitrator shall be final and binding on both the UNION and the COMPANY.

The expenses of the arbitration shall be borne equally between the COMPANY and the UNION.

*Section 3.* Arbitration of Discharge Cases

a. The letter of intent to arbitrate shall be submitted by the UNION within thirty (30) calendar days of receipt of the Plant Manager's letter denying the grievance.

b. The submission agreement shall be executed by the COMPANY and the UNION within fifteen (15) calendar days of submission of the letter of intent to arbitrate. A standardized submission agreement as agreed to by both parties will be utilized.

c. The parties shall attempt to agree on a panel of ten arbitrators. In the event that they are unable to do so, the UNION will request a list of twenty (20) arbitrators from the American

Arbitration Association (AAA). *In* seven (7) calendar days after receipt of the list from AAA, The UNION and the COMPANY will strike one arbitrator each, in rotating order, with the COMPANY striking first, until there is a panel of ten (10) arbitrators remaining. This panel of arbitrators shall be used in selecting in rotating order the arbitrator for each discharge case. No panel of arbitrators shall be in effect for more than two years unless agreed to by the UNION and the COMPANY. Upon expiration of a two-year period, the parties shall follow the above procedure to determine a new panel.

d. An arbitrator shall be selected by the UNION and the COMPANY within seven (7) days after execution of the submission agreement. The arbitrator selected shall be requested to be available for hearing within one month from the date of notification of his/her appointment. The COMPANY and the UNION shall make themselves available on the date(s) offered by the arbitrator provided that they are given at least fourteen (14) calendar days notice. The UNION and the COMPANY may agree to waive this provision.

e. A stenographic transcript of the entire arbitration proceeding shall be taken by a certified court reporter. Said court reporter shall be requested to furnish the original transcript to the Arbitrator within two (2) weeks after the hearing. If either party desires a copy of the transcript, the reporter shall furnish said copy provided the cost thereof is borne by the requesting party.

f. Unless the COMPANY and the UNION agree otherwise, briefs shall be mailed to the AAA no later than three (3) weeks after receipt of the transcript.

g. The arbitrator shall be requested to issue a decision no later than thirty (30) days after receipt of briefs.

* * * * *

# APPENDIX G

## SAVINGS AND INVESTMENT PLAN

Originally Adopted: September 1, 1955
Last Amended Effective—January 1, 2005

E. I. du Pont de Nemours and Company

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(a) The Company shall have the authority to control and manage the operation and administration of the Plan and to designate one or more persons to carry out the responsibilities of the operation and administration of the Plan. The named fiduciary for the investment aspects of the Plan is the Vice President, Pension Fund Investment; the named fiduciary for all other aspects of the Plan is the Director, Compensation and Benefits. The named fiduciary for the investment aspects of the Plan may appoint an investment manager or managers to manage all or some of the assets invested in Fund B, and, by such appointment, unless specifically excluded in any agreement with

such investment manager, delegates to such investment manager or managers the power to appoint additional investment managers with respect to all or part of the assets managed by such investment manager.

(b) All authorizations, designations and requests concerning the Plan shall be made by employees in the manner prescribed by the Company.

(c) The Company, or its designee by written instrument, shall have the responsibility of appointing Trustees, as provided in Paragraph 1. (a) of Section X., Paragraph 1 of Section XI. and Paragraph 1 of Section XII., and the Compensation and Benefits Committee, or its designee by written instrument, shall have the responsibility of making the designations called for pursuant Paragraph 1.(b) of Section X.

(d) The Company retains discretionary authority to determine eligibility for benefits hereunder and to construe the terms and conditions of the Plan. The decision of the Company shall be final with respect to any questions arising as to interpretation of this Plan.

(e) E. I. du Pont de Nemours and Company is the Plan Administrator.

(f) Subject to the requirements of the Code, the Company may authorize the Trustees of the Plan to accept a rollover of assets in cash, stock and/or promissory notes received in an eligible rollover distribution from an

eligible retirement plan as described in Code See. 402(c)(8)(B). Any stock received will be allocated to the corresponding Fund. The account holder shall designate the manner in which all other rollover contributions to the Plan will be invested. All taxable amounts received will be treated as earnings in the Regular Account; non-taxable amounts received will be treated as After-Tax Contributions in the Regular Account.

(g) A newly hired employee who has made a rollover contribution to the Plan in accordance with Subparagraph (f) who has not otherwise become a Participant of the Plan may make, with respect to his rollover contribution, fund transfers in accordance with Section VIII. and withdrawals in accordance with Section XIV.; provided, however, that such employee shall not have a right to make Before-Tax Contributions, After-Tax Contributions or have Company Contributions made on his behalf or institute loans until he has otherwise satisfied the requirements imposed by Section II.

(h) Subject to the requirements of the Code, the Company may authorize the Trustees of the Plan to accept a trust-to-trust transfer of assets requested by a Participant, Retired Participant or Spouse Beneficiary in cash, Company common stock and/or promissory notes received from a qualified defined contribution plan. The Company common stock shall be allocated to Regular Account Fund D. The account holder shall designate the

manner in which all other transferred contributions to the Plan will be invested. Taxable amounts received pursuant to this Section will be treated as Earnings in the Regular Account. Nontaxable amounts will be treated as Unmatched After-Tax Contributions.

(i) If a payment from the Plan is an eligible rollover distribution within the meaning of Section 401(0(2)(A) of the Code, the Participant, Former Participant, Retired Participant, Spouse Beneficiary or Alternate Payee may instruct the Plan Administrator to make a direct rollover of all or a portion of his distribution to an eligible retirement plan within the meaning of Section 402(c)(8)(B) of the Code. If an eligible account holder elects not to make a direct rollover of all or any portion of an eligible rollover distribution, that portion shall be subject to the withholding specified in Section 3405 of the Code.

(j) Overpayments of a distribution under this Plan shall be repaid within thirty (30) days after written demand is made for repayment by the Plan Administrator. In the event repayment is not made either within thirty (30) days of such demand or in accordance with such terms as may be agreed to by the Plan Administrator, an amount, to the extent available, equivalent to the overpaid amount shall be deemed to have been withdrawn by the account holder under Section XIV., XV. or XVI., whichever is applicable, and the limitation on the

number of Withdrawals contained in Section XIV.1, shall not apply to such Withdrawal. Until any remaining overpaid amount is repaid or restored, a Participant shall neither deposit After-Tax Contributions nor make Before-Tax Contributions, and Company Contributions shall be suspended.

(k) Notwithstanding any other provision of the Plan, benefits under the Plan shall be limited as required by the Internal Revenue Code.

2. Administrative Expense

(a) Reasonable expenses of administering the Plan, including, but not limited to, record keeping expenses, trustee fees, and transactional costs shall, at the election of the Plan Administrator, be paid by account holders.

(b) Brokerage fees, transfer taxes, investment fees, wrap fees, rebalancing fees and other expenses incident to the purchase and sale of securities and other investments and incident to the administration of Funds B, C, D, E and F shall be included in the cost of such securities or investments, or deducted from the net asset value of the fund, as the case may be.

(c) Rebates of record keeping costs or other discounts in connection with investment vehicles available in the Plan shall be used to pay the reasonable administrative expenses of the Plan. If such rebates are paid to the Plan, any excess remaining after

reasonable administrative expenses have been paid shall be allocated equally among all account holders who have an account balance greater than zero on an allocation date chosen by the Plan Administrator.

3. Modification or Termination

The Company reserves the right to change or discontinue this Plan in its discretion by action of the Company or by written instrument executed by such person or persons as the Company may designate; provided, however, any change which has the effect of reducing or terminating benefits under this Plan will not be effective until one year following announcement of such change by the Company, unless earlier change is required to comply with governmental regulations. In the event of the complete or partial termination of the Plan, or complete discontinuance of Company Contributions under the Plan, distribution of full shares of Company common stock, and all cash balances including those resulting from the liquidation of Funds B, C, E and F will be made to the affected Participants in accordance with Section XVI.4.(a).

* * * * *

## APPENDIX H

Your DuPont Benefit Resources

**DuPont Savings and Investment Plan**

July 2003

As of July 2003, participating employers in the DuPont Savings and Investment Plan include:

E. I. du Pont de Nemours and Company

DuPont Dow Elastomers L.L.C.

Optimum Quality Grains, L.L.C.

DuPont Textiles & Interiors, Inc.

DuPont Photonics Technologies, L.L.C.

DuPont Protective Apparel Marketing Company

All references to "the Company" in this document pertain to the specific company that employs you.

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* * * *

**Plan Documents**

This Summary Plan Description is intended to provide you with a reasonably thorough explanation of the DuPont Savings and Investment Plan. Wherever possible, nontechnical language has been used to explain Plan provisions. The official Plan texts are the E. I. du Pont de Nemours and Company Savings and Investment Plan and the Trustee Agreement between the Company and the Plan trustee. These texts are the governing documents in the event questions arise.

**ERISA Rights**

As a participant in the DuPont Savings and Investment Plan, you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA entitles you to:

- examine, at the Plan Administrator's office and other specified locations, including work sites and union halls if applicable, without charge, all Plan documents governing the Plan. These documents may include insurance contracts, collective bargaining agreements if applicable, and the latest annual report (Form 5500) filed by the Plan with the U.S. Department of Labor and available at the Public Disclosure Room of the Employee Benefits Security Administration.
- obtain, after sending a written request to the Plan Administrator, copies of documents governing the operation of the Plan, including insurance contracts and collective bargaining agreements if applicable, and copies of the latest annual report (Form 5500 Series) and updated Summary Plan

Description. You may be asked to pay a fee for the copies.

- receive a written summary of the Plan's annual financial report. The Plan Administrator is required by law to provide each participant with a copy of this summary annual report.
- obtain a statement telling you whether you have a right to receive a benefit at normal retirement age and if so, what your benefits would be at normal retirement age if you stop working under the Plan now. If you do not have a right to a benefit, the statement will tell you how many more years you have to work to get a right to a pension. This statement must be requested in writing and is not required to be given more than once every twelve (12) months. The Plan must provide the statement free of charge.

In addition to creating rights for Plan participants, ERISA imposes duties on the people responsible for the operation of the Plan. The people who operate your Plan, called "fiduciaries," have a duty to do so prudently and in the best interest of you and other Plan participants and beneficiaries. No one, including your employer, your union or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a benefit or exercising your rights under ERISA.

If your claim for a benefit is denied or ignored, in whole or in part, you have a right to know why this was done, to obtain copies of documents relating to the decision without charge, and to appeal any denial, all within certain time schedules.

Under ERISA, there are several steps you can take to enforce your rights. For instance, if you request a

copy of Plan documents or the latest annual report from the Plan and do not receive it within 30 days, you may file suit in federal court. In such a case, the court may require the Plan Administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the Plan Administrator's control.

If you have a claim for benefits that is denied or ignored, in whole or in part, you may file suit in a state or federal court. In addition, if you disagree with the Plan's decision or lack of decision about the qualified status of a Qualified Domestic Relations Order or medical child support order, you may file suit in federal court. If Plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in federal court. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees if, for example, it finds your claim is frivolous.

If you have any questions about your Plan, contact the Plan Administrator. If you have questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from the Plan Administrator, contact the nearest office of the Employee Benefits Security Administration, U.S. Department of Labor, listed in your telephone directory. You may also contact the Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. You

may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Employee Benefits Security Administration.

**Using ERISA's Claims Procedures**

ERISA requires that the plans it covers include certain procedures for filing claims and for reviewing claims that are denied. The intent is to make sure that all benefit claims are considered fully, clearly, and promptly.

Although the Company's procedures have been providing full and fair consideration of benefit claims for many years, ERISA requires certain formal approaches.

Keep in mind that nothing required by ERISA changes the way DuPont benefits are normally administered. ERISA's claims procedures are available if you feel you aren't getting the benefits you are entitled to through normal channels.

You should file your claim for benefits in writing with DuPont Connection, P.O. Box 1407, Lincolnshire, IL 60069-1407. If your claim doesn't include the right information, you'll be notified in writing, what you need to do to get your claim processed.

E. I. du Pont de Nemours and Company, as Plan Administrator, has full discretion and authority to interpret Plan provisions, resolve any ambiguities and evaluate claims. The Company's decisions are final and binding.

If your request for distribution from your account or other claim is denied, you will be told in writing within 90 days after your claim is received. That reply will include:

- the specific reasons for the denial;
- references to the provisions of the benefit plan or practice involved;
- a description of what, if any additional information is necessary and why; and
- a copy of these procedures or comparable information about the steps you need to take to resubmit it.

If the reply can't be made within 90 days, you will be given a written notice explaining the reasons why. An extension will not exceed another 90 days.

If your claim is denied, you may request a review by DuPont by writing to DuPont Connection, P.O. Box 0448, Ft. Lee, NJ 07024-0448 within 60 days of the denial.

In your request, list the issues and comments you'd like to have considered. If you prefer, you may have an authorized representative send in the request on your behalf. You or your representative may, at a reasonable time and place, inspect relevant documents which may affect your claim.

Within 60 days after your request for review is received, you will receive a response in writing. In the case of a continued denial, you will be given the specific reasons and the Plan provisions on which the denial is based. If the review can't be made within 60 days, you will be notified in writing. Again, that notification will outline the reasons behind the delay.

**Future of the Plan**

While the Company intends to continue the benefits and policies described in this booklet, the Company reserves the right to suspend, modify, or terminate this Plan at its discretion at any time.

# APPENDIX I

## § 1002. Definitions

* * * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * * *

## § 1004. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

* * * * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * * * *

**§ 1132. Civil enforcement**

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

* * * * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * * *

**§ 1133. Claims procedure**

In accordance with regulations of the Secretary, every employee benefit plan shall—

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

**§ 2560.503-1. Claims procedure**

(b) Obligation to establish and maintain reasonable claims procedures.

Every employee benefit plan shall establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determi-

nations, and appeal of adverse benefit determinations (hereinafter collectively referred to as claims procedures). The claims procedures for a plan will be deemed to be reasonable only if-

(1) The claims procedures comply with the requirements of paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) of this section, as appropriate, except to the extent that the claims procedures are deemed to comply with some or all of such provisions pursuant to paragraph (b)(6) of this section;

* * * * *

(6) In the case of a plan established and maintained pursuant to a collective bargaining agreement (other than a plan subject to the provisions of section 302(c)(5) of the Labor Management Relations Act, 1947 concerning joint representation on the board of trustees)—

(i) Such plan will be deemed to comply with the provisions of paragraphs (c) through (j) of this section if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference—

(A) Provisions concerning the filing of benefit claims and the initial disposition of benefit claims, and

(B) A grievance and arbitration procedure to which adverse benefit determinations are subject.

(ii) Such plan will be deemed to comply with the provisions of paragraphs (h), (i), and (j) of this section (but will not be deemed to

comply with paragraphs (c) through (g) of this section) if the collective bargaining agreement pursuant to which the plan is established or maintained sets forth or incorporates by specific reference a grievance and arbitration procedure to which adverse benefit determinations are subject (but not provisions concerning the filing and initial disposition of benefit claims).

* * * * *

(2)

Supreme Court, U.S.
FILED
DEC 24 2008
OFFICE OF THE CLERK

No. 08-699

IN THE

# Supreme Court of the United States

E.I. DUPONT DE NEMOURS & COMPANY,
*Petitioner,*

v.

AMPTHILL RAYON WORKERS, INCORPORATED,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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December 24, 2008

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## QUESTIONS PRESENTED

Whether an employer who has arguably breached provisions in its collective bargaining agreement by decreasing fringe benefits may escape the contractual arbitration procedure by having the dispute resolved through ERISA benefit claims procedures which, as a matter of law and by stipulation, are prohibited from addressing the breach of contract issues.

## PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Respondent states that the parties to the proceeding in this Court are the same parties who appeared before the Fourth Circuit.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Ampthill Rayon Workers, Incorporated, states that it is a Virginia not-for-profit corporation with membership limited to employees represented by the Union at DuPont's Spruance facility in Ampthill, Virginia.

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IN THE

# Supreme Court of the United States

No. 08-699

E.I. DUPONT DE NEMOURS & COMPANY,
*Petitioner,*

v.

AMPTHILL RAYON WORKERS, INCORPORATED,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## INTRODUCTION

This case does not present the question posited by DuPont. DuPont contends that the collective bargaining agreement ("CBA") contains "forceful evidence" that the Union's grievance alleging that DuPont violated the CBA by amending its benefit plans to reduce promised benefits must be resolved through the plans' "dispute resolution procedures for benefit eligibility" rather than through the CBA's arbitration procedure. [Pet. at (i)]. But DuPont has correctly stipulated that "the Plan Administrator cannot ignore Plan amendments because they are

inconsistent with the terms of a collective bargaining agreement." [Opp. App. 1a - 3a].[1]

Although the underlying grievance alleges that DuPont's amendments to four ERISA benefit plans violate the CBA, this case does not involve ERISA. ARWI has never contended that ERISA restricts DuPont's right to reduce plan benefits. Nor has ARWI ever challenged the interpretation or effect of the plan amendments at issue.

DuPont can amend its plans at will except where it has promised in a CBA that it would not do so. The only question presented in this dispute is whether, as the Union contends, the CBA contains DuPont's promise not to reduce plan benefits as it has done here.

ARWI contends, and the Fourth Circuit correctly held, that arbitration is the proper forum for resolving whether these plan amendments breach the Agreement.

The Petition asks the Court to review the Fourth Circuit's decision in a run of the mill case involving the scope of DuPont's contractual agreement to arbitrate grievances alleging a breach of contract. Solely because the grievance alleges a breach of an agreement not to reduce benefits, DuPont asks the Court to dislodge a cornerstone of the national labor policy embodied in the Taft-Hartley Act, 29 U.S.C. §§185 and 173(d): that federal courts should promote arbitration where that is the "Final adjustment ... method agreed upon by the parties." These provisions form the basis not only for the seminal

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[1] DuPont neglected to mention these stipulations in its Petition.

*Steelworker Trilogy*,[2] but also for its progeny, *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986).

DuPont's Petition raises several ERISA questions which are unnecessary for the resolution of this case. ERISA's dispute resolution procedures are uniquely inappropriate to resolve breach of contract issues. Yet DuPont candidly informs the Court that the issue of contractual interpretation must be resolved through the ERISA dispute resolution mechanism so that a court reviewing DuPont's decision will apply the "arbitrary and capricious" standard applicable when a plan fiduciary has discretion to interpret the terms of its plan and which has never been applied to a dispute over the interpretation of a collective bargaining agreement.

DuPont neglects to mention that three other district courts interpreting virtually identical contract language and the same employee benefit plans have also concluded that DuPont must arbitrate similar grievances filed by their unions because the grievances allege breaches of contract, not claims for benefits under plan language. As that unanimity reflects, this is a run of the mill arbitrability case that presents no question warranting review.

## STATEMENT OF THE CASE

E.I. du Pont de Nemours and Company ("DuPont") and the Ampthill Rayon Workers, Inc. ("ARWI") are parties to collective bargaining agreements ("CBA") covering approximately 1,000 workers in two bar-

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[2] *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

gaining units at DuPont's Spruance Fibers Plant. The Agreement contains a grievance and arbitration procedure providing that "Any question as to the interpretation of this Agreement, or as to any alleged violation of the terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, shall at the request of either party be submitted to arbitration" and that "The award by the arbitrator shall be final and binding on both the UNION and the COMPANY." [Pet. App. 11a].

Article VII, entitled "Industrial Relations Plans and Practices," addresses the employee benefit plans made available to ARWI-represented employees. Article VII states, in pertinent part, as follows [Pet. App. 12a-13a]:

**ARTICLE VII**

**Industrial Relations Plans and Practices**

Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges; provided, however, that as long as one of these COMPANY Plans and Practices is in effect at any other Plant within the Company it shall not be withdrawn from the employees covered by this Agreement, and provided, further, that any change in these

> Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the UNION by the COMPANY of such change.
>
> . . . . .
>
> Section 3. In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan, subject to all terms and conditions of said Plan, provided, however, that as long as this Plan is in effect at any other Plant within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement.

DuPont's benefit plans provide that each Plan is administered by a "Plan Administrator" which is DuPont itself. "Claims Procedures," through which an employee whose "claim for benefits" has been denied by the Plan Administrator "may request a review by DuPont" are contained in the Summary Plan Descriptions ("SPDs") DuPont has issued. [Pet. App. 45a, 56a, 57a].

The SPDs do *not* provide that the Union may present a grievance through the Claims Procedures; nor do they provide for consideration of a contention that the terms of the plan are invalid because they do not conform to the requirements of a CBA. [Pet. App. 57a]. Rather, the parties have stipulated that the "eligibility determinations" made by the Plan Administrators and by DuPont's reviewing officials "must be made consistent with the terms of the [plans],

*including any amendments*," and that the Plan Administrators and reviewing officials "cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement." [Opp. App. 1a-3a (emphasis supplied)].

On August 28, 2006, DuPont announced several changes to certain employee benefit plans in which DuPont employees participate. On December 20, 2006, DuPont amended each of the benefit plans to impose the changes it had announced. "[S]everal of the amendments ... amounted to a significant reduction in employee benefits." [Pet. App. 14a-15a].

ARWI filed a grievance alleging that the plan amendments violated Article VII by amending the plans in ways not permitted by the Agreement. [Pet. App. 28a-30a]. After the parties processed the grievance through the contractual grievance procedure without reaching agreement, ARWI demanded arbitration. On January 23, 2007, the parties selected Arbitrator Ira Jaffe to resolve the dispute. DuPont then "reversed course" [Pet. App. 2a], announced that it would refuse to arbitrate any matters alleged in the ARWI grievance, and filed this action. [Pet. App. 15a-16a].

Based on a stipulated record, the District Court granted ARWI's Motion for Summary Judgment on September 24, 2007. Observing that in trying "to construe this grievance as a dispute over benefit eligibility, ... the company has mischaracterized ARWI's grievance" [Pet. App. 19a], the District Court recognized that "ARWI's grievance is quite simply that DuPont's 2006 amendments violated the parties' CBA and should be arbitrated." [Pet. App. 20a-21a] The District Court then concluded that the Union's grievance was arbitrable as to those benefit plans in

dispute and issued a Final Order compelling arbitration of the grievance as to those benefit plans. [Pet. App. 18a-27a].

Relying on this Court's decision in *AT&T Technologies, Inc. v. Communications Workers*, *supra*, 475 U.S. at 647, the Fourth Circuit affirmed. The Fourth Circuit concluded that the dispute comes within the scope of the arbitration clause; that no other provision of the contract expressly excludes this kind of dispute from arbitration; and that no other "forceful evidence" indicates that the parties intended such an exclusion. [Pet. App. 8a-9a].

The Fourth Circuit recognized "that the result of the plans' amendments will decrease the benefits available to certain DuPont employees" [Pet. App. 8a-9a] and that the validity of the amendments will "affect an employee's eligibility to receive benefits under the plans." [Pet. App. 9a]. But the Court explained that this does not serve to make the Union's grievance subject to DuPont's internal claims procedures rather than to arbitration, because "ARWI's breach of contract claims are premised on the fact that [the] *changes* [made to the terms of the plans by the plan amendments] *violate the terms of the CBAs*." [Pet. App. 9a (emphasis in original)].

Steelworker unions representing employees at DuPont facilities in Delaware, New Jersey and New York also filed grievances challenging DuPont's amendments to the benefit plans, under contract language similar to the language of the ARWI Agreement. DuPont refused to arbitrate those grievances, and the District Courts for the District of Delaware, the District of New Jersey and the Western District of New York have all granted judgment to the Steelworkers requiring DuPont to

arbitrate the grievances, on reasoning consistent with that of the courts below.[3] Those decisions have been appealed by DuPont to the Second and Third Circuits.

## REASONS FOR DENYING THE PETITION

All of DuPont's arguments are built on a false premise, because the dispute presented by ARWI's grievance is *not* one that could be resolved through DuPont's internal plan claims procedures. Once that is recognized, it is apparent that the decision below is not in conflict with any decision of this Court or of any Court of Appeals, and that there is no foundation for DuPont's arguments that the decision creates a lack of "harmony" with ERISA

### I. THE FOURTH CIRCUIT DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

DuPont's Petition challenges the Fourth Circuit's application of *AT&T Technologies, Inc. v. Communications Workers*. [Pet. App. 4a-6a]. Arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Warrior & Gulf*, 363 U.S. at 582. Federal courts must determine whether a collective bargaining agreement creates a duty to arbitrate a

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[3] *Steelworkers v. E. I. DuPont de Nemours & Co.*, 549 F. Supp. 2d 585 (D. Del. 2008), appeal docket No. 08-2510-cv; *Steelworkers Local 943 v. E. I. DuPont de Nemours & Co.*, Nos. 07-0965 (RBK), 2008 U.S. Dist. LEXIS 15628 (D.N.J. 2008. 29, 2008), appeal docket No. 08-1873-cv [A. 4a-18a]; *Steelworkers Local 4-786 v. E.I. DuPont de Nemours & Co.*, No. 1:07-cv-00122, 2008 U.S. Dist. LEXIS 21319 (W.D.N.Y. March 18, 2008), appeal docket No. 08-1873-cv [A. 19a-34a].

particular grievance. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. at 649. In making that determination, however, there is a presumption of arbitrability. *Id.* at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 582-583. Where, as here, the arbitration provision is a broad one, "[i]n the absence of an express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 650, quoting *Warrior & Gulf, supra*, 363 U.S. at 584-585.

Dupont asserts that the Fourth Circuit misapplied the "forceful evidence" exception to the presumption [Petition at 8], thereby conceding that the Fourth Circuit accurately concluded that the arbitration clause is "broad" and that there is no express exclusion of this type of grievance. [Petition App. 8a].

In considering and rejecting DuPont's argument that the "subject to" language in Article VII constituted "forceful evidence" that the parties had agreed not to arbitrate disputes of this kind, the Fourth Circuit noted "the fact that the parties chose to explicitly exclude arbitration as a forum for resolving certain types of disputes ..., the CBAs preclude a [probationary] employee disputing his discharge ... or the denial of a promotion from proceeding to arbitration."[4] The Fourth Circuit also noted that DuPont initially recognized that the grievance was subject to arbitration and agreed upon an arbitrator, only later to renege and sue to enjoin the arbitration. [Petition A. 8a]. The Fourth Circuit concluded that "DuPont

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[4] "[C]ontracts that specify certain exceptions imply that there are no other exceptions." Elkouri & Elkouri, HOW ARBITRATION WORKS 468 (6th Ed. 2003).

has not provided "forceful evidence," much less "the most forceful evidence," that the parties" intended to submit an employee's claims alleging violations of the CBAs to the plan administrator or to a federal court." [Petition A. 9a].

This case was presented to the District Court on a stipulated record which contains no bargaining history for the provision in Article VII obligating DuPont to "continue [the ERISA plans], subject to the provisions of such Plans and Practices and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant ...." There is no evidence that the parties meant the "subject to" clause to exclude from arbitration allegations that otherwise lawful "modifications" breached provisions in the CBA.

There are, however, stipulations that the parties understood that DuPont's plan administrators could *not* in the claims procedures address the breach of contract allegations posed by the Union's grievance. [Opp. App. 1a-3a]. These stipulations are "forceful evidence" that the negotiators did *not* intend to exclude such disputes from arbitration.

The situation presented here – a benefit plan claims procedure that does not confer on the administrators the authority to entertain a union's grievance alleging that a plan amendment violates a CBA – has never been found by any court to constitute "forceful evidence" of an intention by the parties to exclude such a grievance from arbitration.

Contrary to DuPont's contention [Petition at 8-12], the Fourth Circuit's decision and analysis does not

present a conflict with decisions of other circuits. All of the cases upon which DuPont relies involve grievances held to be non-arbitrable because they alleged that a participant's claim for benefits had merit under the terms of the plan which the plan administrators had authority to construe; in none of those cases was it alleged that provisions found *solely in the CBA* were the source of the right being claimed.

Thus in *Machinists District 10 v. Waukesha Engine Division*, 17 F.3d 196, 198 and n.1 (7th Cir. 1994), the Seventh Circuit denied arbitration where there was no allegation that benefit changes violated a contract and expressly distinguished, and preserved, *Briggs & Stratton*, where a change in plan terms raised an arbitrable grievance because it alleged a breach of contract.[5] Equally without merit is DuPont's reliance on *Steelworkers v. Commonwealth Aluminum Corp,*. 162 F.3d 447, 451-452 (6th Cir. 1998), where the union made no contention "that the negotiated level of benefits were not properly set out in the Plan booklets." Significantly, the court found that a particular benefit plan evinced "an intention to exclude from arbitration all benefit disputes *which are within the Administrator's authority.*" *Id.* at 451 (emphasis supplied). Finally, in *Oil, Chemical and Atomic Workers, Local 4-449 v. Amoco Chemical Corp.*, 589 F.2d 162 (5th Cir. 1979), the court refused to compel arbitration of grievances where the union did not

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[5] In *Local 232, Allied Industrial Workers v. Briggs & Stratton Corp.*, 837 F.2d 782, 783 (7th Cir. 1988), the Seventh Circuit directed an employer to arbitrate where a grievance "alleged that certain unilateral changes the company made to [its retirement plan] violated the parties' collective bargaining agreement."

allege that the contested plan provisions violated the collective bargaining agreement.

The instant case is similarly distinguishable from *Printing Specialties, Local 680 v. Nabisco Brands, Inc.*, 833 F.2d 102, 105 (7th Cir. 1987), where the court stated that a "passing reference to the Pension Plan in the collective bargaining agreement does not bring specific pension disputes ... under the umbrella of the arbitration clause of the agreement." But the court noted that "[h]ad Nabisco failed to fulfill an obligation under the collective bargaining agreement which abrogated the full force and effect of the Pension Plan ... the result would have been different." *Id.* at 105. Similarly distinguishable is *Crown Cork & Seal Co. v. Machinists*, 501 F.3d 912, 918 (8th Cir. 2007), where the court found that the union could not point to any contract provision that had been violated and reversed an order to arbitrate.

As did the Fourth Circuit, a number other circuits have also required arbitration of grievances alleging that unilateral changes to employee benefit plans breached contracts. *Excelon Generation Co. v. Electrical Workers Local 15 (IBEW)*, 540 F.3d 604 (7th Cir. 2008); *Steelworkers Local 164 v. Titan Tire Corp.*, 204 F.3d 858, 861 (8th Cir. 2000); *Schweizer Aircraft Corp. v. Auto Workers Local 1752*, 29 F.3d 83, 86 (2nd Cir. 1994); *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d 87, 93-94 (D.C. Cir. 1988); *RCA Corp. v. Professional and Technical Engineers Local 241*, 700 F.2d 921 (3rd Cir. 1983).

DuPont's assertion that arbitration would be inconsistent with "the reality that employee benefit plans are offered at the discretion of an employer" [Pet. at 16] overlooks that it is both common and entirely lawful for an employer to enter into a CBA that

requires the employer to provide certain benefits to the employees covered by the CBA. The extent to which Article VII of the CBA prohibits DuPont from terminating or changing its benefit plans "at [its] discretion" is precisely the question that Arbitrator Jaffe is called upon to decide in this case.[6]

In sum, there is no disagreement whatsoever among the Circuits with respect to the question presented by this case.[7]

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[6] Thus, for example, the arbitrator will be required to construe the language in Article VII, Section 1 which states that "[a]ll existing privileges heretofore enjoyed by the employees in accordance with the [specified benefit plans] shall continue, subject to the provisions of such Plans ... and to such rules, regulations and interpretations as existing prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the Company or by the Plant to govern such privileges ...." [Pet. App. 12a-13a.] DuPont apparently intends to argue to the arbitrator that the quoted language gives the Company the right to make "modifications" in the substantive provisions of the Plans, whereas ARWI reads the language as allowing modifications only of "rules, regulations and interpretations," and as requiring that the substantive benefits "heretofore enjoyed by the employees ... shall continue". A dispute of this kind is "grist in the mills of the arbitrators." *Warrior & Gulf*, 363 U.S. at 584.

[7] DuPont's complaint that the court below "failed to consider the substantive provisions of the parties' CBA" [Pet. at 12] also misses the mark. DuPont's contention is that the court did not say enough about the provision in the CBA which states that benefits are to be provided "subject to" the plans' rules and regulations – including, in DuPont's view, the claims procedures in the SPDs. [*See* Pet. at 8-9]. But the Fourth Circuit discussed that provision at length [Pet. App. 6a-7a] and rejected DuPont's argument because it is "unfathomable that either of the parties could assume that the 'subject to' language in Article VII would override the overarching arbitration clause in Article XI of the CBAs," where the Union's grievance was not based on terms of

## II. THIS CASE PRESENTS NO ISSUE REGARDING THE RELATIONSHIP BETWEEN ERISA AND THE NATIONAL POLICY FAVORING ARBITRATION

Ignoring the Fourth Circuit's conclusion that ARWI's grievance presents a classic breach of contract allegation, DuPont discusses ERISA issues which are not presented in this case.

### A. ERISA Does Not Require That Grievances Alleging a Breach of Contract Be Resolved Through Plan Claims Procedures

This case presents no need for an accommodation or "harmonization" between ERISA and Section 301. [Pet. at 21-23]. ERISA does not preempt the Taft-Hartley Act provisions favoring arbitration. 29 U.S.C. §1144(d). Because this case does not involve the processing of a benefit claim, the Fourth Circuit's decision does not jeopardize the "exclusive" ERISA civil enforcement scheme as did the state laws held pre-empted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

As DuPont has repeatedly stipulated, the DuPont plan claims procedure does not allow the plan administrator to consider allegations that plan amendments breach the collective bargaining agreement. [Opp. App. 1a - 3a]. These stipulations correctly reflect both ERISA and Department of Labor Regulations. *See* ERISA Section 503(2), 29 U.S.C. §1133(2); ERISA Section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B);

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the plan but on a claim that DuPont had made "changes" in those plan terms that "*violate the terms of the CBAs*." [Pet. App. 8a-9a (emphasis supplied)].

ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3). Participants and beneficiaries can use a plan's internal procedures to challenge benefit decisions where they contend that the decision maker has failed to provide benefits required by the plan. The types of issues presented and the requirements of the appeals processes are illustrated by Department of Labor Regulations. 65 Fed. Reg. 70246 (November 21, 2000); 29 C.F.R. §2560.503. The Department explained that 29 C.F.R. §2560.503-1(b)(5) "provides, as a general requirement for reasonable claims procedures for all plans, that a plan's claims procedures must include administrative safeguards and processes designed to ensure and to verify that benefit claims determinations are made *in accordance with governing plan documents* ...." 65 Fed. Reg. at 70251 (emphasis supplied).

Each of the five courts which has addressed the grievances challenging DuPont's amendments to its benefit plans has concluded that these grievance do not present a benefit claim which can be resolved through the claims procedures required by ERISA and the Department of Labor Regulations. Without challenging those findings directly, DuPont nevertheless persists in asking the Court to declare that all disputes regarding eligibility for certain benefits contained in DuPont's ERISA plans are to be resolved exclusively through the procedures set forth in those plans. ARWI has never denied that benefit claims based on disputes over the meaning or application of plan language must be resolved through the ERISA claims procedure. But Congress has not mandated that grievances alleging that plan amendments breach a collective bargaining agreement must be resolved through plan claims procedures. To the contrary, Congress and this Court have established

that arbitration is the forum for addressing allegations that plan amendments breach a collective bargaining agreement.

### B. ARWI's Grievance Does Not Challenge DuPont's Actions as an ERISA Fiduciary

DuPont's contention that this Court's decisions confer on employers a right to have the unilateral adoption of a Plan amendment "reviewed under [a] deferential abuse of discretion standard" [Pet. at 15, 19-20] is simply wrong. *See Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). *Metropolitan Life* and *Firestone* define the review that is called for "by principles of trust law" where "[a] trustee [has been] given power to construe disputed or doubtful terms" in "the instrument under which [he] act[s]." *Firestone*, 489 U.S. at 111. *See also Metropolitan Life*, 128 S. Ct. at 2347-48.

These cases do not suggest that deferential review is warranted of a plan sponsor's decision to change the terms of a plan in a way that is alleged to breach a CBA. "[P]lan sponsors who alter the terms of a[n ERISA] plan do not fall into the category of fiduciaries," *Lockheed Corp. v. Spinks*, 517 U.S. 882, 890 (1996), and DuPont "admitted at oral argument that it was acting in its capacity as plan settler when it amended the plans, not in its fiduciary role as plan administrator." [Pet. App. 20a]. ARWI's grievance thus does not challenge any exercise of fiduciary authority, and certainly not a trustee's interpretation of an instrument he has been "given power to construe." *Firestone*, 489 U.S. at 111.

### C. ERISA's Arbitration Provisions Are Irrelevant

Because DuPont did not act in its fiduciary status when amending its plans, the arbitrator selected to determine whether the amendments violate the CBA does not become a plan fiduciary. DuPont's contention in that reghard [Petition at 18-19] has been rejected by the Department of Labor.

Arbitrator Jaffe's status would be most analogous to that addressed in Department of Labor Opinion Letter 81-50A (June 4, 1981). Confronting a grievance alleging a conflict between a collectively bargained agreement and a pension plan provision both governing benefit accrual, the Department concluded as follows:

> ... It appears that the arbitrator has been called upon to construe two documents which comprise, at least in part, the collectively bargained agreements between the Union and the Employer, but that the outcome of the arbitration would have no immediate effect on administration of the plan or on the rights of Plan participants to benefits under the Plan as it is currently drafted. Although the outcome of the proceeding might increase the entitlement of some Plan participants to benefits, it appears that the arbitrator's decision would not affect the long-standing interpretation given to existing Plan provisions. ... a participant's entitlement to benefits under the Plan would be affected only if the Employer were to amend the Plan to achieve compliance with a ruling by the arbitrator.
>
> Based on your representations, it is our understanding that the instant proceeding resembles

> *an extension of the process of collective bargaining* between the Union and the Employer. [Emphasis supplied].

Because there is no dispute concerning the meaning or effect of the 2006 plan amendments or concerning the meaning or effect of the plans, the ARWI-represented employees' "entitlement to benefits under the Plan[s] would be affected only if the Employer were to amend the Plan to achieve compliance with a ruling by the arbitrator" that the amendments violate the collective bargaining agreements. Such arbitration is "an extension" of the collective bargaining process, not the administration of an ERISA plan.

Equally without merit is DuPont's contention that it would breach its fiduciary duty by allowing an arbitrator to resolve the contractual dispute. As in *RCA Corp.* and Opinion Letter 81-50A, Arbitrator Jaffe could not determine the level of plan benefits. But he has jurisdiction to create a "make whole" remedy.

### D. The Arbitration Would Not Involve Statutory Rights

Unlike *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Arbitrator Jaffe will be asked to resolve a purely contractual issue: whether Article VII prohibited DuPont's 2006 plan amendments as applied to the bargaining units ARWI represents. He will not be asked to interpret ERISA or any other federal or state law. DuPont's reference to this Court's forthcoming decision in *14 Penn Plaza v. Pyett*, No. 07-582, *cert. granted*, 128 S. Ct. 1223 (February 19, 2008), is, therefore, misleading.

*Penn Plaza* presents the question whether an employee's right to pursue in court a statutory dis-

crimination claim as to which the employee's interest may conflict with that of the union is forfeited by the union's decision not to present the discrimination claim in arbitration. This case involves no issue of such a nature. ARWI's grievance only calls upon Arbitrator Jaffee to determine the Union's rights under the CBA

## CONCLUSION

The Petition a Writ of Certiorari should be denied.

Respectfully submitted,

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December 24, 2008

# APPENDIX

# APPENDIX A

**Stipulation Excerpts** (emphasis supplied)

11. Benefit determinations, including eligibility determinations, are made by the Plan Administrator, acting as an ERISA fiduciary with respect to such eligibility determinations and in the exercise of its discretion as the only person designated under the SIP to make final determinations and interpretations. The Plan Administrator's eligibility determinations must be made consistent with the terms of the SIP, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement.

17. Article II of the Pension Plan Document provides that the plan is administered by a "Board of Benefits and Pensions," the members of which are appointed by DuPont. Article II addresses the rights and authority of the Board of Benefits and Pensions as Plan Administrator. The Pension Plan SPD describes an employee's right to appeal any denial of a claim for benefits under the Pension Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. The Board of Benefits and Pensions' eligibility determinations must be made consistent with the terms of the Pension Plan, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. Included among claims that are subject to the claims procedure set forth in the SPD are individual eligibility determinations made by the Board of Benefits and Pensions. In some cases, claims related to eligibility determinations may be

asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

22. Consistent with ERISA requirements, the Life Insurance Plan SPD describes an employee's right to appeal any denial of a claim for benefits under the Life Insurance Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. Included among claims that are subject to the claims procedure set forth in the summary plan description are individual eligibility determinations made by the Plan Administrator. The Plan Administrator's eligibility determinations must be made consistent with the terms of the Life Insurance Plan, including any amendments; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. In some cases, claims related to eligibility determinations may be asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

39. Consistent with ERISA requirements, the SPD pertaining to the Beneflex Vacation Buying Plan describes an employee's right to appeal any denial of a claim for benefits under the Beneflex Vacation Buying Plan and specifies that employees whose claims are denied in whole or in part may file suit in a state or federal court to vindicate their rights. The Plan Administrator's eligibility determinations must be made consistent with the terms of the BeneFlex Vacation Buying Plan, including any amendment; the Plan Administrator cannot ignore Plan amendments because they are inconsistent with the terms of a collective bargaining agreement. Included among claims that are subject to the claims procedure set

forth in the BeneFlex Vacation Buying Plan are individual eligibility determinations made by the Plan Administrator. In some cases, claims related to eligibility determinations may be asserted in a civil action pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B).

## APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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Civil No. 07-0965 (RBK),
Civil No. 07-1005 (RBK)

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 943,
*Plaintiff,*

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Defendant.*

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 943,
*Plaintiff,*

v.

DUPONT PERFORMANCE ELASTOMERS, L.L.C.,
*Defendant.*

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February 29, 2008, Decided
February 29, 2008, Filed

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JUDGES: ROBERT B. KUGLER, *United States District Judge.*

OPINION BY: ROBERT B. KUGLER

## OPINION

KUGLER, *United States District Judge:*

Before the Court is a motion by Plaintiff United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied-Industrial and Service Workers Local Union 943 ("Local 943") for judgment on the pleadings or in the alternative, for summary judgment, compelling Defendants E.I. du Pont de Nemours and Company ("DuPont") and DuPont Performance Elastomers, LLC ("DPE") (collectively "Defendants") to arbitrate certain grievances. Further before the Court is Defendants' cross-motion for summary judgment on Local 943's complaints seeking to compel arbitration. Also before the Court are Local 943's motion to strike a portion of the Declaration of Mary Jo Anderson and motion for leave to file supplemental authority. Local 943's grievances challenge amendments Defendants made to some of their employee benefits plans. For the reasons set forth below, the Court will construe Local 943's motion as a cross-motion for summary judgment, which the Court will grant; the Court will deny Defendants' cross-motion for summary judgment. Moreover, the Court will deny Local 943's motion to strike and grant its motion for leave to file supplemental authority.

### I. BACKGROUND

#### A. Collective Bargaining Agreements

This case involves three collective bargaining agreements ("CBAs"). Two of these CBAs are between DuPont and Local 943 and cover certain employees at DuPont's Deepwater, New Jersey plant ("DuPont CBAs"), and the third is between DuPont affiliate DPE and certain employees of DPE's plant in Deepwater. (DuPont Am. Compl. & Answer PP 5, 7.)

Each of these CBAs contain an identical arbitration clause, which states in relevant part, "A grievance relating to the interpretation or to any alleged violation of this Agreement not settled to the mutual satisfaction of either party by . . . the grievance procedure may be submitted to arbitration on written request of either party." (DuPont Am. Compl. Exs. A, B, Art. XI; DPE Compl. Ex. A, Art. X.)

The amendments to which Local 943 objects affected two articles of the CBAs entitled "Industrial Relations Plans and Practices" ("IRP&P provision"), present in both the DuPont and DPE CBAs, and "Hospital and Medical-Surgical Coverage," exclusive to the DuPont CBAs. The IRP&P provision states in part:

> All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the PLANT shall continue, subject to such rules, regulations, and interpretations as existed prior to the signing of this Agreement, and to such modifications thereof, as may be hereafter adopted generally by the COMPANY or by the PLANT to govern such privileges; provided, however, that as long as any one of these COMPANY Plans and Practices is in effect at any other PLANT within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement[.]

(DuPont Am. Compl. Exs. A, B, Art. VII; DPE Compl. Ex. A, Art. VII.) The IRP&P provisions are followed by a list of plans and practices to which the provision applies. In the DuPont CBAs, the list includes three plans to which Defendants made changes: the Pension and Retirement Plan ("Pension Plan"), Savings

and Investment Plan ("SIP"), and Dental Assistance Plan ("Dental Plan"). (Defs.' Stmt. of Facts P 14.) The DPE CBA lists two affected plans, the Pension Plan and SIP. (*Id.* P 19; DPE Compl. Ex. A, Art. VII.)

The DPE CBA also contains an additional section in its Article VII not present in the DuPont CBAs. This "Section 3" requires DPE to provide "benefits as provided by the Company's Beneflex Benefits Plans, subject to all terms and conditions of said Plan." (DPE Am. Compl. Ex. A, Art. VII § 3.) The Beneflex Benefits Plans signify the Beneflex Life Insurance Plan ("Life Insurance Plan") and Beneflex Vacation Buying Plan ("Vacation Plan"). (Defs.' Stmt. of Facts P 20.)

The other Article relevant to the parties' dispute is the "Hospital and Medical-Surgical Coverage" provision at Article XVI, which only appears in the DuPont CBAs. This provision requires DuPont to provide medical coverage through the Medical Care Assistance Program ("MEDCAP"). (Stip. P 15; DuPont Am. Comp. Ex. A, Art. XVI §§ 1-4.) Alternatively, the provision permits DuPont to make premium payments for alternate coverage to an approved Health Maintenance Organization. (*Id.*)

B. Announced Plan Amendments and Resulting Grievances

On August 28, 2006, DuPont sent an email to all U.S. employees announcing changes to its employee benefits offerings. (DuPont Am. Compl. & Answer P 10; DPE Compl. & Answer P 9.) These amendments included several changes affecting new employees hired on or after January 1, 2007: DuPont eliminated their eligibility for the Pension Plan, SIP, MEDCAP, Dental Plan, and Life Insurance Plan and reduced their available benefits under the Vacation Plan.

(Defs.' Stmt. of Facts PP 42, 45-49; DuPont Am. Compl. Ex. C.) The amendments also affected plans of then-existing employees, including modifications to the Pension Plan and SIP. (Defs.' Stmt. of Facts PP 43, 45; DuPont Am. Compl. Ex. C.)

On September 22, 2006, Local 943 filed grievances with DuPont and DPE alleging that the changes violated several provisions of the CBAs. (DuPont Am. Compl. Ex. D; DPE Compl. Ex. C.) Regarding active employees, Local 943 alleged that the changes to the Pension Plan and SIP violated the IRP&P provision of the CBAs because "such changes are not permitted 'modifications' within the meaning of that article and section." (DuPont Am. Compl. Ex. D; DPE Compl. Ex. C.) Local 943 cited the same reasoning for why the changes applicable to new hires contravened the CBAs. (*Id.*) In addition, Local 943 alleged that the changes affecting new hires involved "Company Plans and Practices" within the meaning of the IRP&P provision and that their withdrawal from certain employees covered by the CBA violated that provision since the "Plans and Practices" remained "in effect within the Company." (*Id.*)

Finally, Local 943 had two grievances specific to each CBA. The DuPont grievance claimed that the elimination of MEDCAP for new hires violated the Hospital and Medical-Surgical Coverage provision of the DuPont CBAs. (DuPont Am. Compl. Ex. D.) The DPE grievance alleged that the elimination of the Life Insurance Plan and reduction in benefits under the Vacation Plan for new hires violated the IRP&P provision of the DPE CBA. (DPE Compl. Exs. C, D.)[1]

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[1] The original grievance filed against DPE mistakenly cited Article VIII, Section 1 of the DPE CBA. Local 943 corrected this

In a written response dated January 25, 2007, DuPont asserted that it was not contractually obligated to submit the grievances to arbitration. (DuPont Am. Compl. Ex. E.) It indicated that it considered the grievances to raise disputes regarding the eligibility of Local 943 members for benefits under the plans. (*Id.*) DuPont and DPE stated further that such disputes must be resolved using the claim procedures set forth in the summary plan descriptions of each plan or, once administrative remedies are exhausted, through a civil enforcement action under Section 502 of ERISA. (*Id.*) DPE sent a similar letter on February 27, 2007 to Local 943 concerning the DPE grievances. (DPE Compl. Ex. F.)

C. Resulting Litigation

Local 943 filed suit against DuPont on February 28, 2007 and against DPE two days later, seeking to compel Defendants to submit Local 943's grievances to arbitration pursuant to the arbitration clause in the CBAs. On July 18, 2007, the two cases were consolidated. Five days later, Local 943 filed a motion for judgment on the pleadings or in the alternative, a cross-motion for summary judgment, and Defendants filed a cross-motion for summary judgment based on a stipulated record. Since then, each party filed responses and replies. In addition, Local 943 filed a motion to strike a portion of Mary Jo Anderson's Declaration, which Defendants opposed, as well as a motion for leave to file supplemental authority, attaching a decision in a related case in the Eastern District of Virginia, which Defendants did not oppose.

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error in an amended grievance dated March 2, 2007, which refers to Article VII, Section 3.

DuPont and its affiliates have fielded additional grievances stemming from the same announced benefit plan changes and has refused to arbitrate any of them based on the same reasoning it offered Local 943 in this case. (Knight Decl. Exs. A-G.) Consequently, unions have brought several actions against DuPont seeking to compel arbitration. *See United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, International Union, AFL-CIO-CLC, et al. v. E.I. DuPont de Nemours & Co.*, Civ. A. No. 07-126 (D. Del.); *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 4-5025 v. E.I. DuPont de Nemours & Co.*, Civ. A. No. 07-122 (W.D.N.Y.); *E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, Civ. A. No. 07-52 (E.D. Va.). The parties have filed cross-motions for summary judgment based on a stipulated record in each of these jurisdictions. Only the Eastern District of Virginia has decided the motions, *see E.I. DuPont de Nemours & Co. v. Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d 588 (E.D. Va. 2007), a decision which DuPont has appealed.

This Court will construe the parties' motions as cross-motions for summary judgment, as it relies on Defendants' statement of material facts, which incorporates sources outside the pleadings. Furthermore, given the stipulated record, the Court discerns no issues of material fact.

## II. STANDARD OF REVIEW

Summary judgment is appropriate where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330, 106 S. Ct.

2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could find for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When the Court weighs the evidence presented by the parties, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

When parties file cross-motions for summary judgment, the court must apply the summary judgment standard to each party's motion individually. *See Appelmans v. City of Phila.*, 826 F.2d 214, 216 (3d Cir. 1987). Where review of cross-motions for summary judgment reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts. *See Iberia Foods Corp. v. Romeo Jr.*, 150 F.3d 298, 302 (3d Cir. 1998) (citing *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 145-46 (3d Cir. 1988)).

## III. DISCUSSION

### A. Parties' Arguments

Defendants argue that Local 943's grievances are not within the scope of the arbitration clause in the CBAs. (Defs.' Br. at 16-17.) Defendants argue further that plans not mentioned in the respective CBAs cannot be subject to the arbitration clauses. As for the plans that are referenced in the CBAs, Defendants contend that the grievances implicate eligibility issues, which are not subject to arbitration but instead, pursuant to ERISA, must be handled in the dispute resolution process outlined in the plan documents. Local 943 counters that its grievances do

not question the application of the benefits plans but rather whether the CBAs afford Defendants the power to make the changes to the plans.

B. Grievances Do Not Involve Benefits Eligibility Determinations

Defendants' characterization of Local 943's grievances as involving benefits eligibility determinations is unpersuasive. The Court is instead persuaded by the reasoning of the Eastern District of Virginia in addressing DuPont's identical argument in the suit pending before it. There, the court distinguished the cases cited by DuPont as involving "typical benefit eligibility determinations by plan administrators such as determining whether medical necessity exists for a given procedure or requiring a referral before certain diagnostic tests will be reimbursed." *Ampthill Rayon Workers, Inc.*, 516 F. Supp. 2d at 594. The court continued, "The amendments made to benefit plans by DuPont at issue here are of a wholly different nature than routine benefit eligibility determinations. . . . DuPont has not administered the plans, they have altered them." *Id.* While Defendants' plan amendments presumably could ultimately impact the eligibility of individual employees, the grievances initiated by Local 943 relate instead to whether DuPont's modifications violate the specific terms in the DuPont and DPE CBAs.

C. Plans Referenced in the CBAs Are Subject to the Arbitration Clause

With the nature of the grievances clarified, the Court must next determine whether they are subject to the arbitration clause. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to

submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). The presence of an arbitration clause in an agreement creates a presumption in favor of arbitration. *Id.* at 650. In the case of a broadly worded arbitration clause, the presumption is even stronger. *Id.* When an agreement's arbitration clause is broad, absent "any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 584-585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). Additionally, in evaluating the question of arbitrability, the court must not extend its analysis to the merits of the underlying claim. *Id.* at 649.

Here, the arbitration clause contained in the DuPont and DPE CBAs is broadly worded, thus triggering the strong presumption in favor of arbitration. The clause commits to arbitration any grievance "relating to the interpretation or to any alleged violation of this Agreement," which is not settled via the grievance procedure. (DuPont Am. Compl. Ex. A, Art. XI; DPE Compl. Ex. A, Art. X.) The Third Circuit has characterized as "broad" a similar arbitration clause referring to "any dispute arising out of a claimed violation of this Agreement." *See E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 812 F.2d 91, 92, 95 (3d Cir. 1987); *see also AT&T Techs., Inc.*, 475 U.S. at 650 (finding arbitration clause regarding "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" to be broad). Thus, in order to overcome this presumption of arbitrability, Defendants must show either (1) that

the CBAs expressly exclude the disputes from arbitration or (2) the existence of "strong and forceful" evidence of an intention to exclude them from arbitration. *See United Steelworkers of Am., AFL-CIO-CLC v. Lukens Steel Co., Div. of Lukens, Inc.*, 969 F.2d 1468, 1475 (3d Cir. 1992).

DuPont can show neither of the requirements to overcome the presumption. The arbitration clause plainly covers the grievances at issue because they relate to alleged violations and interpretation of specific articles of the CBAs. Specifically, Local 943's grievances encompass seven issues:

> (1) whether changes to the Pension Plan and SIP affecting existing employees violate Article VII, Section 1 of the DuPont and DPE CBAs because such changes are impermissible "modifications";
>
> (2) whether changes to the Pension Plan, SIP, and Dental Plan affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DuPont CBAs because such changes are impermissible "modifications";
>
> (3) whether changes to the Pension Plan and SIP affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DPE CBA because such changes are impermissible "modifications";
>
> (4) whether changes to the Pension Plan, SIP, and Dental Plan affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DuPont CBAs because the changes constitute the withdrawal of "Company Plans and Practices" that remain "in effect within the Company";

(5) whether changes to the Pension Plan and SIP affecting new hires as of January 1, 2007 violate Article VII, Section 1 of the DPE CBA because the changes constitute the withdrawal of "Company Plans and Practices" that remain "in effect within the Company";

(6) whether elimination of MEDCAP for new hires as of January 1, 2007 violates Article XVI of the DuPont CBAs; and

(7) whether elimination of the Life Insurance Plan and the Vacation Plan violates Article VII, Section 3 of the DPE CBA.

Thus, the grievances involve alleged violations of Article VII, Section 1 of both CBAs, Article XVI of the DuPont CBAs, and Article VII, Section 3 of the DPE CBA, thereby necessitating interpretation of those provisions. As such, each grievance falls within the scope of the broad arbitration clause because each relates to the interpretation or to an alleged violation of the respective CBAs. Moreover, neither the DuPont nor the DPE CBA includes an express limitation that could be read to exclude the grievances made by Local 943 from the scope of the arbitration clause. Finally, Defendants have not pointed to any evidence, much less strong and forceful evidence, of an intention to exclude the benefits plans from the applicability of the arbitration clause. Therefore, the grievances are subject to arbitration pursuant to the respective CBAs.

D. Motions to Strike and For Leave to File Supplemental Authority

Local 943 filed a motion to strike a portion of the Declaration of Mary Jo Anderson, which Defendants submitted in support of their cross-motion for sum-

mary judgment. Local 943 argues that paragraph 32 is not relevant to the inquiry before the Court because it impermissibly attempts to argue the meaning of the IRP&P provisions of the CBAs and otherwise violates the Federal Rules of evidence. Defendants oppose the motion, stating that their cross-motion for summary judgment does not seek a ruling on the merits and, in any case, paragraph 32 contains admissible statements of fact made on personal knowledge. Based on the Court's disposition of the parties' cross-motions for summary judgment, which did not reference the challenged declaration, it will deny Local 943's motion to strike.

In addition, Local 943 filed a motion for leave to file supplemental authority and attached the decision of the Eastern District of Virginia in the case brought by another union against DuPont seeking arbitration of similar grievances arising from the plan changes. Defendants did not oppose this motion; thus, the Court will grant it.

## IV. CONCLUSION

Based on the foregoing reasoning, the Court will grant Local 943's cross-motion for summary judgment and deny DuPont and DPE's cross-motion for summary judgment. Furthermore, the Court will deny Local 943's motion to strike and grant it motion for leave to file supplemental authority. An accompanying order shall issue today.

Dated: 2/29/08

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge

# APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

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07-CV-122S

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS LOCAL UNION 4-5025,
*Plaintiff,*

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
*Defendant.*

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March 17, 2008, Decided
March 18, 2008, Filed

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JUDGES: WILLIAM M. SKRETNY, *United States District Judge.*

OPINION BY: WILLIAM M. SKRETNY

OPINION

DECISION AND ORDER

## I. INTRODUCTION

This case involves a labor dispute between the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 4-5025 ("the Union") and E.I. DuPont DeNemours & Company ("DuPont") over a Grievance filed by the Union. The issue presently before this Court is whether the Grievance is subject to arbitra-

tion under the Collective Bargaining Agreement ("CBA"). Both Parties have filed cross-motions on this issue, which are resolved in this Decision and Order. For the following reasons, this Court finds that the Grievance should be submitted to arbitration.

## II. BACKGROUND

### A. Facts

DuPont, the Defendant, operates a manufacturing facility in Niagara Falls, NY. (DuPont's Memorandum of Law in Support of Summary Judgment, ("DuPont Mem."), Docket No. 32, pp. 8-9). The Union, the Plaintiff in this case, is the collective bargaining representative for the 165 production and maintenance employees at DuPont's Niagara Falls facility. (DuPont Mem., p. 9).

DuPont and the Union are parties to a Collective Bargaining Agreement ("CBA") which governs their employment relationship. (Exhibit A to the Complaint, Docket No. 1 ("CBA")). The CBA contains an arbitration provision which states the following:

> Any question as to the interpretation of this Agreement, or as to any alleged violation of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto, at the request of either party, shall be submitted to arbitration.

(CBA, Art. X, § 1).

The CBA also contains a section relating to employee benefit plans entitled "Industrial Relations Plans and Practices." (CBA, Art. XI). This section provides that:

> All existing privileges heretofore enjoyed by the employees at the said Plant in accordance with

> the following Industrial Relations Plans and Practices of the COMPANY shall continue subject to such rules and regulations as existed prior to the signing of this Agreement and to such modifications thereof as may be hereafter adopted generally by the COMPANY to govern such privileges, provided, however, that as long as any of these COMPANY Plans and Practices is in effect within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement. Any change in the Industrial Relations Plans and Practices, except for the BeneFlex Flexible Benefits Plan, which has the effect of reducing or terminating benefits will not be made effective until twelve (12) months' notice is give to the UNION by the COMPANY of that change. Changes to the BeneFlex Flexible Benefits Plan, including changes that have the effect of reducing or terminating benefits, may be made to the BeneFlex Flexible Benefits Plan in accordance with the terms and conditions of said Plan.

(CBA, Art. XI, § 1 (emphasis added)). The CBA lists several benefit plans that are provided to Union employees, these are:

> BeneFlex Flexible Benefits Plan
> Career Transition Financial Assistance Plan
> Short-Term Disability Plan
> Pension and Retirement Plan
> Special Benefits Plan
> Vacation Plan
> Service Emblem Plan
> Continuity of Service Plan
> Payment to Employees on State and
> National Guard Emergency Duty
> Payment to Employees on Jury Duty

Savings and Investment Plan
Total and Permanent Disability Income Plan

(CBA, Art. XI, § 1 (emphasis added)).

On August 28, 2006, DuPont Senior Vice President Jim Borel issued an announcement via e-mail, which the Union contends violated the terms of the CBA, and which DuPont contends modified the terms of the individual benefit plans. (Exhibit B to the Complaint, Docket No. 1 ("DuPont Announcement")). The e-mail announced various benefit changes for new and existing employees. For instance, the e-mail stated that:

> For employees hired beginning January 1, 2007, the redesigned SIP plan [Savings and Investment Plan] will be the sole vehicle for their retirement security. They will not be eligible to participate in the Pension and Retirement Plan and they will not receive a company subsidy for retiree healthcare (medical and dental) and retiree life insurance. Their maximum annual vacation benefit will be five weeks and they will be eligible to purchase vacation only during the first ten years of employment with DuPont.

(DuPont Announcement, Docket No. 1 (emphasis added)).

On September 6, 2006, the Union filed a grievance arguing that the announced changes violated the terms of the CBA. (Exhibit C to the Complaint, Docket No. 1, ("Grievance")). The Union specifically claimed (1) that the announced changes were not permissible "modifications" of benefit plans within the meaning of Article XI of the CBA; (2) that the "withdrawal" of these plans for new employees violated Article XI of the CBA; and (3) that DuPont had failed to give the Union 12 months notice of the

reduction and termination in certain benefits as required by the CBA. (Grievance, Docket No. 1).

DuPont responded by letter on January 26, 2007, and stated that it was refusing to submit the Grievance to arbitration. (Exhibit D to the Complaint, Docket No. 1, ("DuPont Letter")). DuPont explained that it viewed the Grievance as a dispute over Union members' eligibility for certain benefits under the terms and conditions of the individual benefit plans, and not a dispute alleging a violation of the CBA. (DuPont Letter, Docket No 1).

B. Procedural History

On March 2, 2007, the Union filed a Complaint seeking to compel arbitration, and alleging that DuPont had breached the CBA. (Docket No. 1). On July 23, 2007, the Union filed a Motion for Judgment on the Pleadings seeking an order compelling arbitration. (Docket No. 27).[1] The Union later moved to amend this Motion, specifically as to the relief requested, and stated that in addition to an order compelling arbitration the Union was seeking declaratory judgment that DuPont had violated the CBA, and an award of attorneys' fees and costs. (Docket No. 34).

On July 23, 2007, DuPont filed a Motion for Summary Judgment seeking dismissal of Plaintiff's Complaint. (Docket No. 28).[2] In support of this

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[1] In support of its Motion for Judgment 1 on the Pleadings, the Union submitted a Memorandum of Law and the Affidavit of Jennifer L. Hunter, Esq. In response, DuPont submitted a Memorandum of Law and supporting exhibits. In reply, the Union submitted a Memorandum of Law and a supporting exhibit.

[2] In support of its Motion for Summary Judgment, DuPont submitted the Affirmation of Jennifer G. Knight, the Affir-

Motion, DuPont filed an Affirmation by Mary Jo Anderson (Docket No. 30), which the Union alleges is inadmissible and has moved to strike. (Docket No. 39).[3]

After briefing on the Parties' cross-motions was complete, the Union filed a Motion for Leave to File Supplemental Authority, asking that this Court consider a recently published decision of the District Court for the Eastern District of Virginia: *E.I. DuPont De Nemours and Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp.2d 588, 2007 WL 2812902 (E.D.Va. 2007). (Docket No. 47).[4] The Ampthill Decision reviewed DuPont's 2006 changes to employee benefits, and held that a grievance filed by the Rayon Workers Union challenging these changes should be submitted to arbitration. *Ampthill*, 516 F.Supp.2d 588, 2007 WL 2812902, at *8.

## III. DISCUSSION

### A. Judgment on the Pleadings Standard

Rule 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Courts faced with motions under

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mation of Mary Jo Anderson, a Statement of Facts, a Memorandum of Law, and supporting exhibits. In response, the Union submitted a Memorandum of Law and a Statement of Facts. In reply, DuPont submitted a Memorandum of Law.

[3] In support of its Motion to Strike, the Union submitted the Declaration of James Briggs. DuPont submitted a Response in Opposition, and the Union filed a Reply in Support.

[4] In support of its Motion for Leave to File Supplemental Authority, the Union submitted a Memorandum and a supporting exhibit. DuPont filed a Response in Opposition and a supporting exhibit.

Rule 12(c) apply the same standard used to decide motions brought under Rule 12(b). *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). On a Motion for Judgment on the Pleadings, the Court must draw all inferences in favor of the non-moving party. *Id.*

B. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is warranted where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A "genuine issue" exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A fact is "material" if it "might affect the outcome of the suit under the governing law." Id. In a case where the non-moving party bears the ultimate burden of proof at trial, the movant may satisfy its burden by pointing to the absence of evidence supporting an essential element of the non-moving party's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923

F.2d 979, 982 (2d Cir. 1991). The function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

C. The Union's Motion for Judgment on the Pleadings

The Union has moved for judgment on the pleadings, requesting in part that this Court compel DuPont to submit their Grievance to arbitration. (Docket No. 27). The Union contends that the Grievance alleges a violation of the CBA; that resolving the Grievance will involve interpretation of the CBA; and that the Grievance is therefore subject to arbitration under Article X of the CBA. (Union's Mem. Supporting Judgment on the Pleadings, Docket No. 27, pp. 3-14). DuPont responds that this is not a dispute involving the CBA, but rather, a dispute over the terms, conditions, eligibility, and interpretation of the individual employee benefit plans provided for in the CBA. (DuPont's Mem. Opposing Judgment on the Pleadings, Docket No. 37, pp. 9-10).

The Supreme Court has long held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed ... to submit." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). "[T]he question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers of*

*America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986).

In labor disputes such as this, the United States Supreme Court has recognized a presumption in favor of arbitrability:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*" Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder...." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

*AT&T*, 475 U.S. at 650 (quoting *Warrior & Gulf Nav.*, 363 U.S. at 582-85) (emphasis added).

Like the arbitration provision discussed by the Supreme Court in AT&T, the arbitration provision in the CBA here extends to "[a]ny question as to the *interpretation* of [the CBA]" (CBA, Art. X, § 1 (emphasis added)), and may therefore be characterized as a broad arbitration provision. *AT&T*, 475 U.S. at 650. Accordingly, to overcome the presumption in favor of arbitration, there must be "forceful evidence of a

purpose to exclude the claim from arbitration." *AT&T*, 475 U.S. at 650.

The Union contends that there is a fundamental disagreement between the parties as to whether Article XI of the CBA permits DuPont to unilaterally withdraw certain employee benefit plans. (Union Reply Mem., Docket No. 40, pp. 2-3). DuPont argues that this is not a dispute about the CBA, but rather, a dispute over the terms, conditions, eligibility, and interpretation of the individual employee benefit plans. (DuPont Response Mem., Docket No. 37, pp. 9-10). Here, the Court agrees with the Union that this dispute is a matter subject to arbitration under the CBA.

Article XI of the CBA provides that "[a]ll existing privileges heretofore enjoyed by the employees at the said Plant in accordance with the following Industrial Relations Plans and Practices of [DuPont] shall continue subject to . . . modifications thereof as may be hereafter adopted generally by [DuPont] to govern such privileges." (CBA Article XI, (emphasis added)). Article XI further provides that "as long as any of these [individual benefit plans] is in effect within [DuPont], it *shall not be withdrawn* from the employees covered by this Agreement." (CBA Article XI, (emphasis added)).

The Union contends that the changes outlined in the 2006 Announcement impermissibly *modified* and effectively *withdrew* certain employee benefits provided for in the CBA. (Union's Mem. Supporting Judgment on the Pleadings, Docket No. 27, pp. 3-14). DuPont responds that the 2006 Announcement modified the terms and conditions of the *individual employee benefit plans*, and did not impermissibly modify or withdraw any benefits under the CBA.

(DuPont's Mem. Opposing Judgment on the Pleadings, Docket No. 37, pp. 9-22).

This determination--whether the 2006 Announcement constituted an impermissible modification or withdrawal of benefits--goes directly to the merits of the Union's Grievance, and the question of whether DuPont in fact violated the CBA. Furthermore, the resolution of this question will require an interpretation of the CBA, specifically Article XI and the provisions governing the modification and withdrawal of employee benefits. The CBA states that "[a]ny question as to the *interpretation* of this Agreement, or as to *any alleged violation* of this Agreement . . . *shall be* submitted to arbitration." (CBA, Art. X, § 1 (emphasis added)). Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the matter should be submitted to arbitration under Article X of the CBA.

Note that the Court is not determining here whether the 2006 Announcement *did in fact* impermissibly modify or withdraw employee benefits. Such a holding would effectively determine on the merits whether DuPont violated the CBA as the Union has alleged in its Grievance. Litigating the merits of a plaintiff's grievance on a motion to compel arbitration would undermine the arbitration process and negate any benefits to resolving a dispute through arbitration. Rather, the Court is finding that the allegations contained in the Union's Grievance fall within the scope of the CBA arbitration provision, particularly where there is a presumption in favor of arbitration on public policy grounds.

Accordingly, the Union's Motion for Judgment on the Pleadings (Docket No. 27) is granted in part and denied in part. The Union's Motion is granted in part, in that the Court finds that the Grievance should be submitted to arbitration (with the exception of claims relating to the Medcap Plan and the Dental Plan which the Union has withdrawn). (Union Reply Mem., Docket No. 40, p. 2, n. 1). The Union's Motion is denied in part, in that the Court declines to find whether DuPont has breached the CBA, and declines to award costs and attorneys' fees. Lastly, the Union's Motion to Amend (Docket No. 34) is granted, in that the Court has *considered* the Union's revised request for relief.

D. DuPont's Motion for Summary Judgment

DuPont contends in its Motion for Summary Judgment that the claims in the Union's Grievance are not subject to arbitration. (Docket No. 28). For the reasons stated above, DuPont's Motion for Summary Judgement is denied. Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the Grievance is subject to arbitration under Article X of the CBA.

E. Remaining Motions

After DuPont moved for Summary Judgment, the Union moved to strike the Affirmation of Mary Jo Anderson in support of DuPont's Motion for Summary Judgment (Docket No. 39). DuPont's Motion for Summary Judgment having been denied, the Union's Motion to Strike is denied as moot.

Additionally, the Union filed a Motion for Leave to File Supplemental Authority, asking that this Court consider a recently published decision of the District

Court for the Eastern District of Virginia: *E.I. DuPont De Nemours and Co. v. Ampthill Rayon Workers, Inc.*, 516 F.Supp.2d 588, 2007 WL 2812902 (E.D.Va. 2007). (Docket No. 47). The Union's Motion is granted, in that the Court has considered--but has not exclusively relied on—the Ampthill Decision.

IV. CONCLUSION

For the foregoing reasons, the Union's Motion for Judgment on the Pleadings is granted in part and denied in part; DuPont's Motion for Summary Judgment is denied; the Union's Motion to Amend is granted; the Union's Motion to Strike is denied as moot; and the Union's Motion for Leave to File Supplemental Authority is granted.

Because the Union's Grievance alleges a violation of the CBA, and because resolving this alleged violation will require an interpretation of the CBA, this Court finds that the Grievance is subject to arbitration under Article X of the CBA.

V. ORDERS

IT HEREBY IS ORDERED, that the Union's Motion for Judgment on the Pleadings (Docket No. 27) is GRANTED in part and DENIED in part, con-sistent with the foregoing Decision and Order.

FURTHER, that DuPont's Motion for Summary Judgment (Docket No. 28) is DENIED.

FURTHER, that the Union's Motion to Amend (Docket No. 34) is GRANTED, in that the Court has *considered* the revised request for relief.

FURTHER, that the Union's Motion to Strike (Docket No. 39) is DENIED as moot.

FURTHER, that the Union's Motion for Leave to File Supplemental Authority (Docket No. 47) is GRANTED, in that the Court has *considered* the supplemental authority.

FURTHER, that the Clerk of the Court is directed to take the steps necessary to close this case.

SO ORDERED.

Dated: March 17, 2008
Buffalo, New York

/s/ William M. Skretny
WILLIAM M. SKRETNY
United States District Judge